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IN THE

# Supreme Court of the United States

October Term, 1969

No. 343

BOSTON AND MAINE RAILROAD, *et al.*,

*Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

*Appellees,*

*and*

BOSTON AND MAINE CORPORATION,

*Appellant,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

## JURISDICTIONAL STATEMENT

BOSTON AND MAINE CORPORATION
RICHARD JOYCE SMITH, *Trustee of The New York, New Haven & Hartford Railroad Company*

THE LONG ISLAND RAILROAD COMPANY
CERTAIN CLASS II, TERMINAL AND SWITCHING RAILROADS

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BOSTON AND MAINE CORPORATION,

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v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

## JURISDICTIONAL STATEMENT

Appellants [1] appeal from the United States District Court for the District of Massachusetts after dismissal of con-

[1] Boston and Maine Corporation, Richard Joyce Smith, Trustee of the New York, New Haven and Hartford Railroad Company, The Long Island Railroad Company, and Certain Class II, Terminal and Switching Railroads: The Ahnapee & Western Ry. Co.; Greenville & Northern Ry. Co.; Lake Erie, Franklin & Clarion R. R.

(footnote continued on next page)

solidated actions which sought to set aside an order of the Interstate Commerce Commission. The appellants, pursuant to United States Supreme Court Rules 13(2) and 15, submit this statement to show that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment dismissing the complaints and should exercise such jurisdiction in this case.

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(footnote continued from previous page)

Co.; McCloud River R. R. Co.; St. Johnsbury & Lamoille County R. R. Co.; The San Luis Central R. R. Co.; Tennessee, Alabama & Georgia Ry. Co.; Arcade & Attica Railroad Corp.; Belfast & Moosehead Lake R. R. Co.; Bonhomie & Hattiesburg Southern R. R. Co.; Chicago, West Pullman & Southern R. R. Co.; Claremont & Concord Ry. Co.; Clarendon & Pittsford R. R. Co.; Coudersport & Port Alleghany R. R. Co.; Dansville & Mount Morris R. R. Co.; East Tennessee & Western No. Carolina R. R. Co.; Fernwood, Columbia & Gulf R. R. Co.; Grafton & Upton R. R. Co.; Hoosac Tunnel & Wilmington R. R. Co.; Montpelier & Barre R. R. Co.; Moscow, Camden & San Augustine R. R. Co.; Trona Ry. Co.; and Virginia Blue Ridge Ry. Co.

Intervenors in support of the United States of America and the Interstate Commerce Commission include Chicago, Burlington & Quincy Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railroad Company; Chicago & Eastern Illinois Railroad Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago & North Western Railway Company; Chicago, Rock Island and Pacific Railroad Company; The Delaware and Hudson Railroad Corporation; Erie Lackawanna Railroad Company; Great Northern Railway Company; Gulf, Mobile & Ohio Railroad Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; Louisville and Nashville Railroad Company; Missouri Pacific Railroad Company; Norfolk and Western Railway Company; Northern Pacific Railway Company; The Pennsylvania New York Central Transportation Company; Reading Company; The St. Louis-San Francisco Railway; Seaboard Coast Line Railroad Company; Soo Line Railroad Company; Southern Pacific Company; Southern Railway Company; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company; Union Pacific Railroad Company; and Western Maryland Railway Company.

## OPINIONS BELOW

These are consolidated actions brought to set aside and annul an order of the Interstate Commerce Commission (the "Commission").

*Boston and Maine Railroad, et al.*, v. *United States, et al.*, Civil Action No. 56-1004-G, was brought to review an order of the Commission in ICC Docket 31358 dated October 17, 1955. The Recommended Report of the examiner in ICC Docket 31358 is set forth as Appendix A hereto, and the October 17, 1955 decision of the Commission reported in 297 I. C. C. at page 291, is set forth as Appendix B hereto. The first decision of the district court, reported in 162 F. Supp. at page 289, was rendered May 5, 1958 and is set forth as Appendix C hereto.

The 1958 decision of the court below was appealed to this Court in Docket No. 310, but the appeal was dismissed as premature in view of the decision of the court below that the proceedings should be remanded to the Commission for further consideration. This Court's *per curiam* decision expressly reserved decision on the question of the Commission's adjudicatory jurisdiction. *Boston & Maine Railroad* v. *United States*, 358 U. S. 68, 72 (1958).

On remand, the Commission heard ICC Docket 31358 on a consolidated basis with Docket 33145 which was instituted in 1959, and, after its institution in 1964, on a consolidated basis with Docket 34405. After an examiner's Recommended Report (set forth as Appendix D hereto), the Commission rendered its decision in said dockets on January 17, 1968. This decision is reported in 332 I. C. C. at page 176 and is set forth as Appendix E hereto.

The interlocutory order of the Commission dated September 5, 1962, which denied petitions of Boston and Maine and New Haven dated February 6, 1960 and April 15, 1960 and upheld the propriety of the removal and substitution of

hearing examiners in the subject proceedings, is set forth as Appendix G hereto.

*Boston and Maine Corp.* v. *United States, et al.,* Civil Action No. 68-79-G, was brought in the court below to set aside and annul the 1968 Commission order in ICC Dockets 31358 and 33145.* The complaint in the 1956 action, Civil Action No. 56-1004-G, was amended to include an attack on the 1968 order. The actions were consolidated by order dated June 14, 1968. The decision of the District Court, reported in 297 F. Supp. at page 615, was rendered March 18, 1969 and is set forth as Appendix F hereto.

## JURISDICTION

The appeal herein is from final and interlocutory judgments made and entered in the United States District Court for the District of Massachusetts by three-judge courts, specially constituted under 28 U. S. C. §§1336, 1398, 2284, 2321-2325; 5 U. S. C. §§701-706 and 49 U. S. C. §17(9), upon the plaintiffs' application for a permanent injunction to restrain the enforcement, operation, or execution of the Interstate Commerce Commission orders in *Chicago, Burlingon & Quincy R. Co., et al.,* v. *New York, Susquehanna & Western Railroad Co., et al.,* Docket No. 31358, *et al.,* 297 I. C. C. 291 (1955), and 332 I. C. C. 176 (1968). The final judgment appealed from was made and entered on March 20, 1969. Notice of Appeal was filed in the United States District Court for the District of Massachusetts on May 16, 1969.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment complained of by the provisions of 28 U. S. C. §§1253 and 2101(b).

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* ICC Docket 34405 was dismissed by the Commission in its order dated January 17, 1968 "except to the extent to which the relief sought has been granted by order in Docket No. 33145 . . . ." 332 I. C. C., at 259, Appendix E hereto, p. E84.

The following decisions are believed to sustain such jurisdiction in this case: *Frozen Food Express* v. *United States,* 351 U. S. 40 (1956); *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515 (1946); *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U. S. 236 (1945); *United States* v. *Capitol Transit Co.,* 325 U. S. 357 (1945); *Hudson & Manhattan Railroad Co.* v. *United States,* 313 U. S. 98 (1941); *Chesapeake & Ohio Railway Co.* v. *United States,* 283 U. S. 35 (1931); *Baltimore & Ohio Railroad Co.* v. *United States,* 277 U. S. 291 (1928).

## STATUTES INVOLVED

Sections 1(4), (10), (11), (14)(a), 13(1), 15(2), and 16(1) of the Interstate Commerce Act, as amended (49 U. S. C. §§1(4), (10), (11), (14)(a), 13(1), 15(2), and 16(1)) and Sections 2(c)-(d), 4(c), 5(c), 7(a), 7(c) and 11 of the Administrative Procedure Act (49 U. S. C. §§ 551 (4)-(7), 553(d), 554(d), 556(b), 556(d) and 3105) are set forth in Appendix H hereto.

## QUESTIONS PRESENTED

*(All references to the Act and to sections (§§) in this Jurisdictional Statement are to the Interstate Commerce Act, unless otherwise noted.)*

1. Does the Interstate Commerce Commission have jurisdiction, whether under §1(14)(a), §1(11) or otherwise, to adjudicate claims for car hire charges for past periods?

2. Was it unlawful for the Commission, in its adjudication of claims for car hire charges for the period August 1953 to August 1969, and in its regulation of car hire charges on and after August 1, 1969, to include in the "costs" to be repaid to owners by means of that charge

substantial amounts of money which the uncontradicted evidence of record shows were never expended by owners?

3. Did the Commission, in its adjudication of claims for car-hire charges for the period August 1953 to August 1969, improperly require all such charges to be computed solely on the basis of time, in direct contradiction of its own finding that

> "... reasonable compensation to car owners requires that the ownership costs be distributed among and borne equitably by all railroads making use of such cars in just proportion to the amount of use, [and] that the use made of cars must be measured by both the length of time cars are held and the amount of activity to which they are subjected ...."?

4. Did the Commission in Docket 33145, in attempting to adjust the rate of return cost element of its car-hire charges for the effects of inflation, improperly rely on an index which records the purchase price of freight cars rather than on an index which measures the loss in purchasing power of the dollar?

5. Did the Commission, in its adjudication of claims for car-hire charges for the period August 1953 to August 1969, improperly rely on the use of industry-wide average costs rather than on the costs of the individual complainants and defendants?

6. Is there a zone or range of reasonableness within which proper car hire charges may fall, and, if so, must the Commission, in passing upon the claims for car-hire charges for the period August 1953 to August 1969, make findings as to whether the rates offered by the appellant car users are within such zone of reasonableness?

7. Did the removal and substitution of hearing examiners by the Commission, and the refusal of the Commission and the court below to provide appellants with requested information thereon, particularly with reference to the Commission's compliance or non-compliance with the requirement of Section 11 of the Administrative Procedure Act concerning rotation of hearing examiners, constitute reversible error?

## STATEMENT OF THE CASE

### The Judgment Below

The final judgment appealed from, entered in consolidated civil actions brought by appellants and others as plaintiffs against the United States and the Interstate Commerce Commission, dismissed the complaints herein which had sought to set aside the Commission order entered pursuant to proceedings had after the remand of the court below in Civil Action No. 56-1004-M.* A prior appeal to this Court in Civil Action No. 56-1004-M was dismissed as premature by this Court in a *per curiam* decision in which it expressly reserved decision on the question of the Commission's jurisdiction to adjudicate past claims for car-hire. *Boston and Maine Railroad* v. *United States,* 358 U. S. 68 (1958).

These plaintiffs appeal from the decisions of the court below rendered April 25, 1958 and March 18, 1969 insofar as that court adjudged: (1) that the Commission has jurisdiction to adjudicate claims for car-hire for the period August 1953 to August 1969; (2) that the Commission, in adjudicating such claims and also in regulating car-hire on and after August 1, 1969, committed no error by including, in the car ownership costs for which freight car owners are to receive compensation, substantial amounts

* Civil Action No. 56-1004-M was redesignated Civil Action No. 56-1004-G by order of the court below dated March 27, 1968.

which admittedly were unsupported by any evidence of record and which were affirmatively shown not to have been spent by car owners; (3) that in adjudicating claims for car-hire for the period August 1953 to August 1969 the Commission properly required all such car-hire charges to be calculated solely on the basis of the amount of time foreign cars spend on a user's lines, rather than on the basis of both time and the amount of use made of the cars, *i.e.*, a combined time/mileage basis; (4) that there was no error in the Commission's use of its Index of Freight Car Costs, Account No. 53, as a guide for calculating loss of purchasing power by reason of inflation; (5) that in adjudicating claims for car-hire for the period August 1953 to August 1969 the Commission properly relied on the average costs of all car owners rather than on the actual costs of complainant car owners; (6) that in adjudicating such claims the Commission properly held that there was no zone of reasonableness for car-hire charges and properly refused to determine whether or not the car-hire rates offered by appellants herein (defendants in ICC Docket 31358) were within "any . . . reasonable scope or range of rates"; and (7) that the Commission did not err in its removal and substitution of hearing examiners, or in its refusal to provide appellants information by which the extent of its compliance with the Administrative Procedure Act could be ascertained.

These plaintiffs also appeal the order of the court below dated October 22, 1968, to the extent that it sustained objections to appellants' request for admissions of fact concerning the Commission's assignment and re-assignment of hearing examiners in the subject proceedings.

## Background of Litigation

The Commission order relates to certain "per diem" charges. "Per diem" has become a generic term for freight car rental, or "car-hire". It may refer to any rental charge, whether per day, per mile, or per load, and even to

combinations of such methods of charging for the rental of freight cars. All but one of the nation's Class I railroads own freight cars, and these cars must, by law, be freely exchanged in through transportation. Railroad-owned freight cars are on the lines of railroads other than their owners for hundreds of millions of car-days each year.

The Commission order appealed from determines what are allegedly reasonable car-hire charges for the period 1953 through 1965, approves a method for calculating allegedly reasonable car-hire for "past" years after 1965, and establishes an entirely different system of car-hire to be used in "future" years. This order, and its effect, is fully comprehensible only in the light of the controversy and the context in which it was made.

### Rates Fixed Under Industry Procedures

Under §1(14)(a) or predecessor sections of the Act, the Commission has had the regulatory power to establish by rule the amount of rental "to be paid" for the use of cars of other roads since 1917. The Commission, prior to its order herein, has never successfully exercised that power. The Commission once attempted, in 1947, to exercise its power to regulate car-hire, but the purported regulation was enjoined and set aside on the ground that the Commission had relied on improper criteria in establishing the rental rate.*

The fixing of car-hire has thus been left to agreement among the carriers, acting in recent years through the Association of American Railroads (hereinafter "AAR"). Until about 1946** agreement among all carriers was obtained without serious dissent.

From November 1, 1920 to February 1, 1945, the car-hire rate was $1.00 per car per day. During the period 1945-1947 the rate rose to $1.15, $1.25 and then to $1.50.

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* *Palmer* v. *United States*, 75 F. Supp. 63 (D. D. C. 1947).

** As to the earlier period, see Mr. Justice Stone's dissent in *Chicago, R. I. & Pac. Ry. Co.* v. *United States*, 284 U. S. 80 (1931).

Petitions that the Commission establish a car-hire charge by rule under §1(14)(a) were filed by some short lines and other carriers during that period. The Commission suggested certain modifications of formulae used by the industry to fix car-hire charges, but found the charges just and reasonable and dismissed the complaint.* After 1947, there were successive increases to $1.75 in 1949, to $2.00 in 1950, and to $2.40 on August 1, 1953—a rate of acceleration so much faster than the post-war increases in freight rates (tariffs) allowed by the Commission that it nullified all their benefit as to roads like New Haven, Boston and Maine and Long Island.

The increases to $2.00 and $2.40 were fixed and put into effect under industry procedures set forth in an agreement among some five hundred railroads dated April 1, 1950 known as Agreement No. 7. Agreement No. 7 was approved by the Commission in February 1950 under §5a of the Act (known as the Bulwinkle Act, 49 U. S. C. §5b). *Section 5a Application No. 7, Association of American Railroads Per Diem, Mileage, Demurrage and Storage—Agreement*, 277 I. C. C. 413 (1950). The earlier $1.75 charge, fixed under a limited predecessor agreement, was adopted and continued pursuant to the procedures set forth in Agreement No. 7 (Art. IX).

Both under Agreement No. 7 and its predecessor, final action on the above-mentioned increases was determined by industry vote. This vote is weighted heavily in favor of the large car-owning roads in that each road has as many votes as it owns cars (Art. IV of Agreement No. 7).

Railroads acquire freight cars primarily to meet the demands of shippers on their lines (R.** 842, 55, 576). The

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* *Alabama, T. & N. R. R.* v. *Aberdeen & R. R. R.*, 274 I. C. C. 383, at 384, 399 (1949).

** R. indicates the transcript before the Commission prior to the reopening of the proceedings.

appellants are "terminal" railroads serving densely populated areas which consume more freight than they originate. These roads necessarily send back substantial numbers of empty foreign cars, because they have more foreign cars available for loading than they have originating freight. Such roads own relatively few freight cars and, indeed, appellant Long Island owns none. In contrast, the great majority of the freight cars are owned by roads which originate more traffic than they terminate. These roads are creditors on settlement of net car-hire accounts ("net creditors") while the terminating roads are generally "net debtors" on the settlement of their car-hire accounts.

Since at least 1946, majority voting control of the car-hire charge has been vested in a relatively small group of large car-owning railroads. For example, in 1952, 23 railroads (most of them complainants or intervenors in support of complainants before the Commission) owned 1,121,225 of the total 1,776,853 freight cars owned by Class I railroads (Ex. 14, R. 333, 863-4), and thus had over 63% of the total votes. The possession of this power by the per diem net creditor roads, coupled with the financial inducement to exercise it, enabled the adoption by majority car-owning vote of the successive proposals for increases in the per diem charge (R. 862-4, 866-7).

Less than four months after the Commission in July 1949 dismissed the short lines' petition for Commission regulatory action, the increase to $1.75 was made effective by action of the large car-owning roads (R. 245). To support this increase and the succeeding increases to $2.00 and $2.40, further successive changes were made in the formula (R. 91, 93-4, and fn. p. 12, *infra*), in each case providing support for a greater increase than would have emerged from application of the previous formula to the "cost" figures of the latest available year.* Pro-

* See initial Commission Report (297 I. C. C., 291, at 305-6, Appendix B, p. B27-B29) and fn. p. 12, *infra*.

tests by terminal roads to the AAR (R. 874-5, 877-9) were rejected or ignored (R. 251-2, 878-9, 889-91).

Until 1951 the railroads generally, signers and non-signers of Agreement No. 7 alike, settled with one another at the rates adopted or determined thereunder. In March 1951, however, the New York, Susquehanna & Western Railroad (which was not a party to Agreement No. 7) served notice that it would no longer pay the $1.75 per diem charge then in effect (pp. 23-24 of Ex. 53; R. 875-7 and R. 882). Instead, it offered to settle its per diem accounts thenceforth on a differently calculated basis, reflecting the cost of the cars in the individual ownership of each road (R. 879-882, 902-8). The Boston and Maine and four other roads accepted the Susquehanna's offer (R. 882-3, 954).

All of the large car-owning roads rejected the offer (R. 883). Virtually all of them also refused or ignored the Susquehanna's subsequent offers to negotiate individual bases of settlement with each road (R. 890) and demanded that the Susquehanna pay the uniform industry-fixed charge, variously terming it "the established rate," "the going rate," "the rate fixed by the AAR" (R. 883).

To support the increase to $2.40, a further change was made in the method used by the AAR in calculating the rate. This accounting change alone added more than $130,000,000 per year to the "costs" reflected in the per diem charge.* Eight roads which were subscribers to Agreement No. 7 refused to pay this increase, either withdrawing under Article X or exercising the "right to take independent action" under Article XII. These roads offered to continue to pay approximately $2.00 per day in final settlement of all car rentals.

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* R. 173, 96-7; sheet No. 4 of Ex. 4, R. 69, 219: The difference between lines 13 and 3 ($4,170,742,649) was added to the depreciation base. At the depreciation rate in effect for that year of 3.12% annually (*idem.*, line 20), this added $130,127,170 per year.

As Susquehanna had done, Boston and Maine and New Haven offered to agree on rental charges with each road individually. The increase to $2.40 was made effective by the AAR on August 1, 1953 (R. 245). The roads which replied declined to enter into any arrangement other than one at $2.40 (R. 400). Boston and Maine and New Haven then made what was thought to be "a general generous compromise offer" (R. 400-4, 420-1, 352-5, 409, 422), but the complaint before the Commission in ICC Docket 31358 followed almost at once, on September 21, 1953. The Susquehanna and seven of the non-assenting roads were defendants and the remaining dissenter, The New Jersey and New York, was added by subsequent amendment.

**Docket 31358—The Commission Proceedings**

That complaint alleged that, to the extent that the payments tendered and offered by the nine defendant roads in settlement of their car-hire accounts were less than the uniform industry-fixed charges, such payments, tenders and offers, "are and would be unjust, unreasonable and non-compensatory, in violation of Paragraphs (4), (10) and (11) of Section 1 of the Act."

The complainants did not seek money damages; as relief they asked that the Commission "find and declare" that the $1.75, $2.00 and $2.40 per diem charges were "during the periods in which these rates were effective . . . just, reasonable, and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers."

In their principal brief to the Commission in 1954 the complainants disclaimed any intention to invoke the Commission's regulatory power to establish car-hire charges under §1(14)(a). As the Commission said in its report, "Such action . . . would render the present procedure for

dealing with per diem charges inoperative." Instead, they expressly asked "that after settling the present controversy by appropriate findings the Commission should release the subject matter to the industry for private handling" under the procedures of Agreement No. 7, stating that the Commission findings sought by complainants

> "will be sufficient and effective as the basis for settling outstanding per diem balances and for assuring observance of whatever may be the established rate in the future." *

The Commission granted the relief prayed on October 17, 1955. Appellants decried this decision as a mere rubber stamp approval of the industry procedures and filed an action to set aside the decision.

**The Commission Reversed**

In its 1958 decision, the court below held, with one judge dissenting, that the Commission (under §§1(11), 13(1) and 16(1) had jurisdiction to determine whether and to what extent the rental prices fixed by collective industry action exceeded the maximum of what is reasonable, and to award recoupment of any such excess to protesting roads—the latter having acted at their peril in failing to pay the collectively-fixed prices in the first instance, however unreasonable. The district court, nevertheless, remanded the matter to the Commission for further proceedings on the ground that the Commission had not given sufficient consideration to plans submitted for reflecting in the car hire charge the use made of the cars, by requiring payment on the basis of mileage as well as on the basis of time. In *dicta*, the court also expressed considerable doubt as to the Commission's cost calculations.

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* Par. 40 of the 1956 complaint in Civil Action No. 56-1004-M admitted by answer of intervening defendants (par. 25).

### Appeals to This Court Held Premature

An appeal in 1958 by plaintiffs below to this Court in Docket No. 310 sought a reversal on the ground, *inter alia,* that the Commission did not have jurisdiction to adjudicate per diem for the past. A cross appeal sought reversal of the court below on the mileage point, and reinstatement of the Commission decision. Both appeals were dismissed as premature in view of the district court remand and the Commission's statement that it was willing to proceed in accordance with the remand. In dismissing the appeals this Court stated that its dismissal was

> "without prejudice to raising the 'adjudicatory' issue again, if it survives the further Commission proceedings." 358 U. S. at 72.

### Docket 31358 Reopened by ICC

On February 19, 1959, complainants in ICC Docket 31358 petitioned the Commission to reopen that proceeding. On March 24, 1959, the Commission granted the petition.

On April 21, 1959, the Boston and Maine, the New Haven, and the New Jersey and New York filed a motion to dismiss the complaint, to vacate the Commission's order of March 24, 1959, and for other relief. This motion also petitioned the Commission to require each complainant to "allege the specific amount of monetary damage which it individually claims to have been caused to it by each of these defendants . . ."; and that each complainant be required to establish its own individual costs of ownership of cars used by each defendant. The motion also prayed that the Commission direct that the controlling issue in the proceedings be whether defendants' car hire payments to complainants were below the *minimum* of reasonable compensation. Finally, the motion prayed that the Commission institute both a proceeding under Section 1(14)(a) of the Interstate Commerce Act for determination of future per diem charges,

and, as well, an investigative proceeding pursuant to Section 20 of the Interstate Commerce Act for the purpose of determining car ownership costs.

Complainants' reply of April 30, 1959, opposed all of the relief sought by defendants. The Commission, on May 14, 1959, reserved decision as to initiating proceedings under Section 1(14)(a) and Section 20, and denied all the other motions.

On July 24, 1959, the Commission granted those parts of the motion of April 21, 1959 which had not been denied on May 14, 1959. The Commission ordered that prescriptive action be taken under Section 20 of the Interstate Commerce Act for the purpose of gathering statistics and information on car ownership costs. The Commission also initiated a new proceeding, *Railroad Freight Car Per Diem Charges*, Docket 33145, under Section 1(14)(a). The Section 1(14)(a) proceeding was denominated an "investigation rulemaking proceeding" and was ordered heard "on a consolidated record" with Docket 31358.

**Removal of the Hearing Examiner by ICC**

At a pre-hearing conference held on September 29, 1959, Hearing Examiner Mittelbronn, after considering the issues to be heard and the data required for their resolution, ruled that certain accounting forms would be served on all 564 railroad respondents in Docket 33145. He assured the parties that the Commission would order such service (R2* 90-91), and that all necessary forms would be prescribed (R2 84-85).

Thereafter Division 2 of the Commission promulgated two orders dated November 25, 1959 which prescribed certain accounting forms but omitted several of the agreed upon forms. One of those orders did not provide for

* R2 indicates the Transcript before the Commission after the reopening of proceedings.

service upon all respondents. Appellants considered such service a prerequisite for the validity of these proceedings under Section 4 of the Administrative Procedure Act, 5 U. S. C. §553.

Upon learning of the issuance of the orders of November 25, 1959 Boston and Maine and New Haven commenced preparation of a petition for reconsideration and modification of the orders. In the course of the preparation of the petition, early in December 1959, Carl E. Newton, counsel for Boston and Maine and New Haven, telephoned the hearing examiner to request that copies of the orders be served upon counsel (as he had understood the examiner to have assured all counsel they would be), and to protest the apparent breach of understanding concerning the nature and service of the forms. At that time counsel was informed (1) that the examiner had protested the same defects without result and had gone so far as to inform Stephen A. Aplin, Director of the Commission's Bureau of Rates and Practices, that he did not wish to be associated with the proceeding if these orders were not corrected, and (2) *that these proceedings had been reassigned to some other hearing examiner.* This statement was made prior to January 1, 1960. Consequently the petition was expanded to include a prayer "that the Commission cause the order, directive, assignment or other procedure assigning a hearing examiner other than the originally assigned hearing examiner to the proceedings herein to be cancelled and vacated, and the originally assigned hearing examiner to be reassigned to these proceedings." This petition was served and filed on December 24, 1959 and followed similar petitions filed by the Ahnapee & Western Railway Company and other respondents.

Subsequently and on or before January 7, 1960, Division 2 corrected all of the defects in the orders of November 25, 1959 of which we (and the hearing examiner) had complained, by ordering service of the proper forms on all

parties. No action was taken at that time in regard to the reported replacement of the examiner.

There followed a period of six weeks during which the Commission was silent as to the prayers of petitioners directed to the assignment of the examiner. Beginning February 2, 1960 petitioners attempted unsuccessfully to arrange a meeting with Chairman Winchell concerning this matter, but were unable to gain any further information concerning the disposition of their prayer other than that it was under consideration and would be acted upon. As a result it was necessary for petitioners to file a petition for reconsideration and modification of the order of Division 2 dated January 7, 1960, which petition repeated the prayer of the petition of December 24, 1959 concerning the hearing examiner's removal. It further requested that the Commission make available and forward to petitioners certified copies of any documents evidencing facts pertinent to his removal. That petition was served and filed on February 6, 1960.

On February 15, 1960 orders were issued by the Commission 1) denying the petition of New Haven and Boston and Maine, dated December 24, 1959, 2) relieving Hearing Examiner Mittelbronn and 3) reassigning responsibility for the conduct of hearings to another examiner. These orders were supported only by the finding (on no evidence available to the parties and contrary to counsel's understanding of the facts) that Examiner Mittelbronn "of his own volition" had requested to be relieved on September 14, 1959. Thus the record is clear that the Commission did not relieve Examiner Mittelbronn until over five months after his protestations as to the Commission's irregular and unlawful procedures, and five weeks after the correction of all the defects of which the examiner had complained.

In an unsuccessful attempt to resolve the objections to the substitution of hearing examiners, Boston and Maine

and New Haven even expressed a willingness that the hearing examiner originally assigned to Docket 31358 in 1953, Examiner Hosmer, be reassigned and offered to waive all procedural objections in that event.

A further petition for reconsideration and modification of the orders of February 15, 1960 was filed on April 15, 1960. In a supplement to that petition, also served on April 15, 1960, appellants Boston and Maine and New Haven sought

> "(1) The assignment list of Commission hearing examiners available and qualified for assignment to proceedings in Docket Nos. 31358 and 33145, arranged in the order of their availability for assignment 'in rotation' (pursuant to Section 11 of the Administrative Procedure Act [5 U. S. C. §3105]) which was in effect as of September 29, 1959, and any and all subsequent lists made effective after that date.
>
> "(2) Copies of all orders or other documents assigning hearing examiners appearing on the assignment list or lists described above which have been made between the dates of September 29, 1959 and February 29, 1960."

These requests were made so as to enable appellants herein to have a provable record of pertinent facts concerning the assignment of a new hearing examiner to the subject proceedings.

By order dated September 5, 1962 the petitions dated February 6 and April 15, 1960 were in all relevant respects denied. This order and the opinion of the Commission are set forth as Appendix G hereto.

### Amendments to ICC Complaints

On June 17, 1959, complainants had filed a petition to amend the complaint, seeking a declaration that the $2.75 per diem rate was reasonable. This rate had been promul-

gated by the AAR effective January 1, 1957. Commissioner Tuggle granted the petition on June 23, 1959.

On June 15, 1962 eighteen complainants in Docket 31358, and thirteen intervenors in support of that complaint, together with twenty-five other railroads * which were seeking leave to intervene, filed a petition seeking leave to file amended complaints, amended petitions of intervention or petitions of intervention as the case might be. This petition was filed pursuant to an order in *Baltimore & O. R. R., et al. v. New York, N. H. & H. R. R., and One Hundred and Nine Other Similar Cases Against the Above Named Defendant or Boston and Maine R. R.*, 196 F. Supp. 724 (S. D. N. Y. 1961). Those suits had been brought by 56 railroads against the New Haven and or the Boston and Maine, seeking enforcement of alleged contractual and *quantum meruit* rights to the payment of the industry-fixed (AAR) per diem charges.**

Their petition was granted on December 19, 1962. The complainants and intervenors, in accordance with the order of the New York District Court, prayed in their amended complaint, served June 7, 1963:

> "that, in addition to the relief sought in the complaint herein, as heretofore amended, the Interstate Commerce Commission, without regard to the proceeding in Docket No. 33145, . . . advise the United States District Court for the Southern District of New York . . . what per diem rate was just, fair, reasonable and non-discriminatory for each month beginning with August, 1953, to date, and in so advising the said Courts, find and declare that the

* One of these intervenors in support of the complaint was originally a defendant (Rutland Railway) and one was an intervenor in support of defendants (Savannah and Atlanta Railway).

** Similar claims had also been made in suits in the Supreme Court of the State of New York.

per diem rates which were just, fair, reasonable and non-discriminatory during the aforesaid period were: a rate of not less than $2.40 between August 1, 1953 and December 31, 1956; a rate of not less than $2.75 between January 1, 1957 and November 30, 1959; and a rate not less than $2.88 from December 1, 1959 to date."

On March 6, 1964 the Commission again granted complainants leave to further amend their complaints. The new amendment recited the promulgation by the AAR of the graduated or multilevel* car-hire rates which had become effective January 1, 1964, and prayed that the complaint be considered "as further amended by bringing into issue in this docket the [1964 multilevel] per diem rates . . . and that the Commission make a declaratory ruling thereon."

### Institution of ICC Docket 34405

On March 10, 1964, the Commission served, and ordered defendants to answer, a complaint in Docket 34405. This complaint was styled *Southern Ry. et al.* v. *The Pennsylvania R. R., et al.* The complaint prayed that the Commission prescribe a future per diem rate, and that the Commission do so on a consolidated docket with Dockets 33145 and 31358. This Docket 34405 was thereafter heard on a consolidated record with Dockets 33145 and 31358.

### ICC Hearings and Examiner's Report

In the meantime pre-hearing conferences and hearings had been held. After the final hearing in November 1964, briefs in the consolidated proceedings before the hearing

* These multilevel rates, and the different multilevel rates which were put into effect by the AAR on April 1, 1965, are daily rates which vary according to the cost of the individual car.

examiner were filed April 12, 1965. The examiner's proposed report was served on December 23, 1965. This report is annexed hereto as Appendix D. Exceptions were filed May 9, 1966 and Replies to Exceptions were filed September 19, 1966.

### Section 1(14)(a) Amended

Effective May 26, 1966, Section 1(14)(a) of the Act was amended to enable the Commission to consider whether compensation to car owners fixed by it pursuant to that section of the Act should include an

> "incentive element . . . as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense."

### Parallel Proceedings Before ICC

On June 23, 1966, the Commission instituted a proceeding styled Ex Parte No. 252, *Incentive Per Diem Charges*, in order to determine whether, and to what extent, the Commission should impose the incentive charge authorized by the above quoted amendment to §1(14)(a). This proceeding was discontinued by the Commission on October 3, 1967 after it found:

> ". . . upon consideration of the record herein, after enlisting the aid and advice of all railroads subject to our jurisdiction, and of other interested parties, that there is not available at this time reliable factual data which would enable this Commission to comply with the statutory requirements and make a valid decision as to the imposition of an interim incentive charge." (332 I. C. C. 11, 18)

Shortly thereafter, on December 15, 1967, the Commission instituted the proceeding styled Ex Parte No. 252 Sub. 1, *Incentive Per Diem Charges,* intended more fully to develop facts which the Commission had found lacking in its decision dismissing Ex Parte No. 252. A wide-ranging study of car-handling practices on roads throughout the country has been made and a second study is now being conducted.

**The Commission's Decision in Docket 31358, et al.**

The Commission denied requests for oral argument in Docket Nos. 31358, 33145 and 34405 and rendered its decision therein on January 17, 1968. That decision according to its terms establishes:

(1) That the complainants before it had failed to carry the burden of showing that the AAR per diem rates in effect from and after August 1, 1953 were just, fair, reasonable and non-discriminatory;

(2) That specific per car day rates (which are set forth in the appendix to the decision) were just, fair, reasonable and non-discriminatory rates for application as between adverse parties to the car-hire litigation pending in the United States District Court for the Southern District of New York and the Supreme Court of the State of New York, for the period August 1, 1953 through 1965;

(3) A formula based on the car ownership costs of all railroads for the years 1965, 1966, 1967 and 1968, by means of which per car day rates for application as between adverse parties to the New York car-hire litigation for the period January 1, 1966 to August 1, 1969 could be determined; and

(4) That from and after August 1, 1969* respondents in Docket 33145 be required to maintain accurate mileage records so as to permit settlement of car-hire payments thereafter on the basis of the time mileage rates found reasonable by the Commission in Docket 33145.

In its calculations of car-hire charges for the future in Docket 33145, the Commission incorporated an adjustment (in the rate of return element) ostensibly to compensate owners for the loss in purchasing power of the dollar. 332 I. C. C. at 213, Appendix E hereto, p. E38. That adjustment was made on the basis of changes in the actual purchase price of freight cars from year to year as reflected in the Account No. 53 Index of Freight Car Costs of the Commission's Bureau of Accounts, Section of Valuation. 332 I. C. C. at 210, Appendix E hereto, p. E35.

In determining the costs upon which to base car hire charges payable by Boston and Maine and New Haven,** the Commission relied entirely on studies of industry-wide, average costs collected during 1960 by its Section of Cost Finding. The Commission then used these 1960 costs to determine costs for other years by means of ratios and apportionments developed from special studies which

* Per car day rates, rather than rates based on both time and mileage elements, according to the Commission's January 17, 1968 decision, were to cease to apply in favor of time mileage rates on October 1, 1968. That date was subsequently postponed by order of the Commission dated May 29, 1968 to November 15, 1968, and then postponed *sine die* by order of the Commission dated November 13, 1968. It has now been set as August 1, 1969, by order of the Commission dated June 12, 1969.

** The rates established by the Commission for application until August 1, 1969 apply only between the opposing parties in the litigation in New York. The position of the Long Island Rail Road Company and other parties defendant before the Commission which are not involved in the New York litigation is left unclear.

were also conducted by the Section of Cost Finding. The Commission, however, refused to apply the results of the Section of Cost Finding's 1960 studies in its disposition of the "repair deficiency" or time/mileage issues, each of which involves substantial amounts of money.

References to the "repair deficiency" are somewhat misleading. This phrase has become a shorthand term for the costs which are incurred in fact by *car users* in inspecting and maintaining, as well as repairing, foreign cars, but which, *although held by the Commission to be the responsibility of owners rather than users,* are not repaid to users.

All trunk line roads employ car inspectors who inspect foreign cars at various points on line for needed repairs. Most of the cost of this inspection was held by the Commission to be properly included in the cost of owning cars. These costs are referred to as ownership inspection costs, but are in fact paid by users, not owners.

Where a foreign car is found to need replacement of a part which has become defective, the user road makes the needed repair. If a repair is made, but it was occasioned by ordinary wear and tear rather than the user's negligence, it is universally agreed that that cost also is an owner-responsibility cost rather than a cost which should be borne by the user. One reason for this is that the user may only have had the use of the car for a small fraction of the replaced part's life or may have been merely bridging the car empty to its home line and have never had any productive use of the car.

The AAR has established "repair billing rates" at which users bill owners for owner-responsibility expenses incurred by users. These repair billing rates, however,

admittedly are designed to return to the user substantially less than the expenses it incurs. For instance, the cost of inspecting foreign cars repaired, and the far more numerous foreign cars found *not* to need repair, are not covered at all by the repair billing rates; and (as the Boston and Maine and New Haven had claimed for many years) the Commission's Section of Cost Finding showed that these repair billing rates cover only a small portion of the repair facilities' overhead costs which are properly the responsibility of owners. Further, the repair billing rates only partially compensate the user for the cost of the actual part replaced. The repair billing rates were found by the Commission's Section of Cost Finding to have been less than the users' actual expenditures by $98,534,020, or 41.417 cents per car day, in the year 1960.* .

The Commission in its decision included, in the costs to be repaid to owners *via* the car-hire charge, the total amount of the owner-incurred *and user-incurred* owner-responsibility maintenance and inspection costs with no adjustment for the facts (1) that a large part of these expenses (more than $98,000,000 in 1960) *had never been incurred by owners* and therefore could not be considered compensable to owners, and (2) that these expenditures in fact constituted prepayments of car-hire by users and, if the use of averaging in determining car hire charges was proper, should be considered as a credit applied to each car day's rental incurred by users, thus reducing the net payment per day by car users.

Although appellants are willing to concede that the Commission could refuse to make an adjustment in the

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* Report of the Commission, 332 I. C. C., at 189-190, Appendix E hereto, pp. E14-E15.

rate for the latter fact and could remit appellants to seeking repayment by way of counterclaim in the suits in the Southern District of New York, it was clearly unlawful for the Commission to include in the "costs" of ownership any amount which was not in fact spent by owners.

**Judicial Review**

On January 30, 1968, Civil Action No. 68-79-G was instituted by Boston and Maine and on May 17, 1968 a supplemental complaint was filed by New Haven in Civil Action No. 56-1004-G. These actions to set aside the Commission's decision were consolidated by order of the district court dated June 14, 1968.

On or about February 23, 1968, the action styled *Union Pacific R. R.* v. *United States and Interstate Commerce Commission*, Civil Action No. 02981, was instituted in the District of Nebraska to have set aside the Commission decision.

On April 24, 1968, the action styled *Baltimore & O.R.R.* v. *New York, N.H. & H.R.R.*, Civil Action No. 148-323 in the District Court for the Southern District of New York, was stayed pending final judicial review of the subject Commission decision.

By order dated June 19, 1968 in the consolidated actions below, appellees herein were restrained during the pendency of this litigation from seeking to enforce the subject Commission order, except so much of the order in Docket 33145 as requires roads to maintain accurate mileage records. By order dated November 7, 1968, the District Court for the District of Nebraska in *Union Pacific R. R:* v. *United States, et al.*, Civil Action No. 02981, described above, temporarily enjoined the enforcement of the entire Commission order in Docket 33145. We are informed that that injunction has now been dissolved. Unless stayed by this Court, the record-keeping provisions of the Commission order in

Docket 33145 will become effective August 1, 1969 (see footnote*, p. 24, above).

Oral argument in the consolidated actions was had below on November 8, 1968, and the decision of the court was rendered on March 18, 1969. In it, the district court held that the terms of its remand had been complied with and that the Commission had properly set specific rates for the past (notwithstanding its failure to incorporate a mileage element in them) and had properly established procedures for setting car-hire charges for the future. It held that the Commission properly included in the amounts to be returned to complainant car owners (via "per diem") amounts which reflect costs never incurred by car owners—the "repair deficiency." It held that the Commission's use of a replacement cost index was proper to provide owners with protection from inflation. It held that the Commission, in granting compensation to complainant car owners for past use of freight cars, had discretionary power to relieve complainant car owners of the burden of proving their actual costs, and to base its findings solely on the average costs of all car owners. It held that the Commission "properly was not concerned" with whether the rates which appellants had offered to pay* complainant car owners for past use of freight cars fell within any "reasonable zone or range of rates", and in fact that there is no such "reasonable zone or range" of car-hire charges. Finally the court rejected the claim that appellants had been denied their rights under the Administrative Procedure Act by the Commission's reassignment of hearing examiners and the Commission's subsequent refusal to give appellants access to information concerning the assignment and reassignment of examiners.

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* Since the withdrawal of appellants Boston & Maine and New Haven from Agreement No. 7 on June 10, 1953, they have permanently settled car-hire for the past with various roads at other than "industry rates" as shown by the "Statements of Satisfaction of Complaint" in the Commission's record of these proceedings.

Appellants assert that the court erred in these respects. Appellants also assert that the majority of the court erred in its 1958 decision in Civil Action No. 56-1004-M by concluding that the Commission had jurisdiction to adjudicate past car-hire claims, and appellants respectfully refer to the dissenting opinion reported at 162 F. Supp. 298 for the expression of appellants' view as to the limitations of the Commission's jurisdiction with respect to car-hire.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND REQUIRE THIS COURT'S PLENARY CONSIDERATION

These appeals raise questions of general importance as to the interpretation of the Interstate Commerce Act and the Administrative Procedure Act.

Two of the questions presented by these appeals have previously been submitted to this Court in the 1958 appeal in Docket No. 310, *Boston and Maine Railroad, et al.* v. *United States, et al.* Those questions concern: (i) the lack of jurisdiction in the Commission to adjudicate car-hire claims for the past; and (ii) the lack of obligation on the part of car users to pay car hire at any rate in excess of the lowest reasonably compensatory rate. The appeal in Docket No. 310 was dismissed as premature in view of the remand of the district court and in view of the fact that the record in Docket No. 310 presented "only 'an interim' ruling." (358 U. S. at 72.) The several other questions presented by these appeals developed subsequent to this Court's prior decision.

### 1. The Commission's Lack of Jurisdiction to Determine Car-Hire Rates for the Past.

The 1956 decision in the Massachusetts District Court (Civil Action No. 56-1004-M) authorized the Commission to by-pass the only rule-making provision applicable to car-hire, §1(14)(a) of the Act. The district court held

that the declaratory order procedure and the provisions of §§1(11), 13(1) and 16(1) of the Act were an appropriate jurisdictional basis for the adjudication of car-hire claims for the past. That court, however, remanded the proceeding to the Commission for further study of a proposal to assess car-hire on a time mileage rate rather than a strict time (per day) rate.

The 1969 decision of the district court in the consolidated cases, Civil Action Nos. 68-79-G and 56-1004-G, found that on remand the Commission properly acted pursuant to the authority of §*1(14)(a)* in Dockets 33145 and 34405 * in setting car-hire rates, or methods for determining such, for the period August 1, 1953 to August 1, 1969. (Decision below, 297 F. Supp. 615, 617, Appendix F hereto at p. F3). These dockets were instituted in 1959 and 1964 respectively.

Insofar as the decision below upholds the Commission's jurisdiction (under §1(14)(a)) to determine claims for car-hire *for past periods* by enforcing retroactive regulatory rules or declarations respecting car-hire, it does so without authority and contrary to law. §15(2) of the Act; §§2(c), (d), 4(c) of the Administrative Procedure Act, 5 U. S. C. §§551(4)-(7), 553(d); *cf. Brimstone R. R.* v. *United States*, 276 U. S. 104 (1928); *cf.* also *United States* v. *Baltimore & Ohio R. Co.*, 284 U. S. 195 (1931). The 1969 decision of the court below on this point asserts a jurisdictional basis different from that which the court found to exist in 1958. The newly asserted basis was considered only in the 1958 dissent, wherein the late Judge McCarthy discussed a point which the majority opinion then did not decide, noting that:

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* Apparently the court below assumed that Docket 31358 had been dismissed by the Commission after it found that the complainants before it had failed to show the industry fixed (AAR) rates to have been just, fair or reasonable.

> "1. The fact that the charges could have been established under Section 1(14)(a) is not enough for the Commission to endorse them. *Under that section the Commission could not establish rates retroactively.*" (162 F. Supp. at 300, Appendix C hereto, p. C23.) (Emphasis added.)

The 1969 decision asserts an impossibility because §1(14)(a) speaks only to regulation of future acts, the Commission did not even have a regulatory proceeding before it until 1959, and did not issue a regulation thereunder until 1968. By the Commission's own order, this regulation is not to become effective until August 1, 1969.

Though the 1969 decision of the court below cited only the authority of §1(14)(a), the Commission was also without statutory authority to adjudicate claims for past car-hire under §1(11), and was accordingly without jurisdiction to enter a declaratory judgment regarding such under §5(d) of the Administrative Procedure Act, 5 U. S. C. §554(e). The rule-making provision relating to car service (§1(14)(a)) specifically includes the subject matter of "compensation" payable by one railroad for the use of another's cars. Thus the Commission unquestionably has specific authority to *regulate* car-hire. But §§1(10) and 1(11), enacted contemporaneously therewith,* though they follow the language of §1(14)(a) very closely, omit the reference to compensation. In 1958, the majority decision (162 F. Supp. 289, at 293-4, Appendix C at p. C7-C9) read "compensation" into §§1(10) and 1(11) in order to uphold the Commission's jurisdiction to adjudicate claims for past car-hire.

Thus two questions are presented: (1) whether §1(14)(a) of the Act gives the Commission authority to *adjudicate* claims for car hire for *past* periods; and (2) whether

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* The Esch Car Service Act of May 29, 1917, C. 23, 40 Stat. 101.

§§1(10) and 1(11) give the Commission authority to adjudicate compensation for car use, even though those sections omit any reference to such a power. *Cf. Chicago, Rock Island & Pacific Ry.* v. *United States*, 284 U. S. 80, 99 (1931); see also *Missouri Pacific R. R.* v. *Norwood*, 283 U. S. 249, 257 (1931).

**2. The Substantial Evidence Rule.**

In determining the past car-hire rates to apply between the plaintiffs and defendants in the car-hire litigation pending in New York, the Commission included in the cost base, upon which the car-hire rates were calculated, substantial amounts which admittedly were never expended by car owners. It is undisputed that car owners are actually credited in the Commission's calculations with expenses which in fact were incurred not by car owners but by car users. These expenses are loosely referred to as the "repair deficiency." The repair deficiency for the Commission's base year (1960) was in excess of $98,000,000.

Though it is clear that car users have "prepaid" this 98 million dollars, the Commission has, by belatedly refusing to consider this prepayment contemporaneously with its adjudication of the basic car-hire rate for the past, remitted Boston and Maine and New Haven to asserting their right of recoupment by way of counterclaims in the District Court for the Southern District of New York and the Supreme Court of the State of New York. Appellants do not attack that determination here, though it would not appear to be the most efficient disposition of this complex matter. However, both the Commission and the district court have also concluded that owners are entitled to have these amounts *included* in the amounts which *owners* expended and for which they can look to users for "compensation". The Commission has held that the car users' expenditure shall be deemed the car owners' "cost of ownership". Appellants consider this plain error.

The car owners cannot lawfully recover, via car hire, money that they admittedly never spent. A "cost of ownership" must be an expenditure by owners. No amount of administrative expertise can justify so bald a transfer of funds from one side of the ledger to the other.

The district court, in endorsing a decision of the Commission allowing the complainants in Docket 31358 "compensation" for expenses which the record indisputably shows were never incurred by them, disregards a patent violation of due process and section 7(c) of the Administrative Procedure Act, 5 U. S. C. §556(d). Appellants assert that the Commission's inclusion of these amounts in the cost base on which the car-hire rates were calculated is unsupported by any evidence, and that the court below should have so held.

### 3. The Failure of the Commission to Include a Mileage Element in the Car-Hire Charges for the Past.

In its 1958 decision, the court below remanded Docket 31358 to the Commission for further consideration with respect to the inclusion of mileage as one of the determinants of the car-hire charge. This remand reflected the court's view that the costs of car ownership might appropriately be related both to the passage of time (for which a per day rate would be appropriate) as well as to the amount of use which car users make of owners' cars (for which a per mile rate would be appropriate). The Commission in its 1968 decision modified its insistence upon a time only rate, and found

> "*That reasonable compensation to car owners requires that the ownership costs be distributed among and borne equitably by all railroads making use of such cars in just proportion to the amount of use, that the use made of cars must be measured by both the length of time cars are held and the amount of*

> *activity to which they are subjected, and that the most practicable and reliable method of measuring car activity is the line-haul mileage over which they are moved. . . .*" 332 I. C. C., at 258, Appendix E hereto, p. E83. (Emphasis added.)

That finding was not a finding limited in application to only one or the other of the proceedings before it, as were some of the Commission's findings, but rather one of general relevance to the proceedings had.

The Commission also found, however, that

> ". . . no practicable and probative method has been demonstrated on this record by which a reliable estimate might be made as to the distribution of costs between time and mileage for individual defendants in past years, or for all railroads for years other than 1960." 332 I. C. C. at 247, Appendix E hereto, p. E72.

The use of ratio analysis to produce passable statistics for application to years other than 1960 was as to this issue held unsuitable despite the assertions of the Commission's own Section of Cost Finding, the Commission's Bureau of Enforcement, and the hearing examiner, that these calculations could and should be made.

From the findings (1) that time and usage were both "required" elements in a "reasonable" car hire charge, and (2) that the data necessary for the separation of time and usage elements in rates for the past was not in the record, the conclusion of the Commission was not that the complainants had, to that extent, failed to carry the burden of proof. Nor was it that further evidence on the point would be received. Nor did the Commission hold that the known and confirmed 1960 mileage figures for individual roads would be used as a basis for estimating relative mileage figures for other years. On the contrary, the Commis-

sion concluded that, in this adversary proceeding to recover claimed car-hire charges for the past, the failure of proof by complainants justified imposition on defendants (appellants herein) of a car-hire charge based solely on time.

The Court below has now endorsed this conclusion as within the Commission's discretion because "the law does not demand the impossible." 297 F. Supp. at 619, Appendix F. p. F6.

Appellants assert that the Commission's decision is internally inconsistent on this critical issue and that, even aside from its internal inconsistency, the Commission does not have discretion in an adjudicatory proceeding to burden the defendants before it with the consequences of a failure of proof on the part of the complainants.

By exclusion of any consideration of a mileage factor in the car-hire rate prior to August 1, 1969, complainants have been given a major concession covering the 16 year span as to which the Commission's decision (if upheld) as to past rates will apply. Conversely, appellants (defendants before the Commission), which have for 16 years been asserting the principle which the Commission has finally upheld, are to be denied the benefits which an application of that principle would provide.

The average mileage per day of appellant Long Island illustrates the extreme inequity which would result from allowing the Commission's decision to stand. The average daily distances foreign per diem cars were moved in 1960 by the Long Island, as found by the Commission, was 4.8 miles.* Yet the impact of the Commission's decision to ignore mileage for the past is to make the Long Island pay as if it moved cars the average daily distance all foreign cars were moved on all roads, i.e. approximately 59.2 miles

* 332 I. C. C. at 219, Appendix E hereto, p. E44.

per day in 1960. Similarly Union Pacific, in paying for the use of New Haven cars for example, would be required by the Commission to pay for only that same average 59.2 miles per day, though the Commission found that the Union Pacific moved foreign per diem cars on Union Pacific rails an average of 120.9 miles per day in 1960.** The refusal to give appellants the benefit of the mileage factor for which they fought will create gross injustice and constitutes arbitrary and unreasonable treatment.

The court below apparently agreed that a result based on the national average daily distance foreign cars are moved by all roads combined, i.e. the result reached by the Commission by refusing to apply any mileage factor, would be unjust.

> "On the basis of these figures for 1960 it seems *obvious* that an average figure for line-haul mileage would *not be fair or just.*" 297 F. Supp. at 620, Appendix F, p. F9. (Emphasis added.)

It nevertheless refused to set the Commission decision aside, apparently unaware that this is precisely what the Commission decision as to the past is based on.***

Appellants consider this refusal to apply mileage to the past to be arbitrary and unreasonable, particularly in view of the fact that it is supported by the Commission, and endorsed by the court below, solely on the ground that the required data was not available. Appellants

* Statement of R. W. Fondersmith of the Commission's Cost Finding Section, Exhibit R-8, p. 43.

** 332 I. C. C. at 220, Appendix F, 12 note, p. F45.

*** What appellants had argued for below was the use of aggregate and ratio analysis in arriving at an average daily mileage figure for New Haven, for instance, and for each of the other individual adversary roads, *not* a single national average for all roads which both the court below and appellants here agree produces an unfair and unjust result.

have fought for years to show that car hire payments must be based on use as well as time in order to be equitable. Other railroads asserted that the Commission must find the industry (AAR) rates fair and just. Yet, despite the Commission's finding against the industry rates, and despite the finding that equitable rates must include a mileage factor, and despite the assertions of the Section of Cost Finding and the hearing examiner that a mileage factor could be applied to past years, the Commission cast upon the defendants before it (appellants herein) the burden of proving the actual miles traveled by each individual car on their lines. What the Commission is saying is that averages are fine for practically all costs—indeed, even national average costs, rather than those of complainants'—but to apply a mileage factor defendants must show the actual mileage of each freight car rented from 1953 to 1969. The Commission's action in this regard is without support in law or fact.

**4. The Commission's Adjustment for the Loss in Purchasing Power of the Dollar.**

The Commission, in adjusting the rate of return element of the costs compensable to owners for the effects of inflation, used an index known as the Account No. 53 Index. That index in fact bears no necessary relation to the loss in the purchasing power of the dollar and does not even purport to assess the effects of inflation. It is merely a historical record of the cost of freight cars, and does not purport to isolate the effects of inflation from the effects of improved design, increased size or changed technology, and the Commission so found:

> "It . . . appears that the index includes other improvements which form integral parts of new cars such as improved metallurgical design of wheels, self-aligning trucks with one-piece cast steel bolsters, case steel side frames with integral journal boxes, stabilizing devices, snubbing features built into side

frames, wear plates in critical wear areas, journal roller bearings, improved coupler designed [sic] and draft gears design advances." 332 I. C. C. at 210. Appendix E hereto, p. E55.

It is a *freight car* index, not a *money* index. Even if owners used car-hire revenue *only* to buy freight cars, and they of course do not do so, the use of the Account No. 53 Index would be improper. Accordingly, if the Commission in fact rejects the use of reproduction costs for calculating ownership costs, as it purports to do (332 I. C. C. at 258, Appendix E hereto, p. E83), the use of the Account No. 53 Index was clearly improper.

Appellants assert that the Commission, once it decided to make an adjustment for inflation, was bound to use an index appropriate for that purpose. The index widely approved for that purpose, the Wholesale Price Index of the Bureau of Labor Statistics, would clearly have been proper. The question presented by the Commission's action is whether, under the guise of an adjustment for inflation, the Commission may incorporate in the cost base for determination of car-hire charges, fictitious "costs" based on an index showing the year to year purchase prices of freight cars.

### 5. The Discretion of the Commission to Use Average Costs in Adjudicating Rates for the Past.

The court below decided that the use of average costs in adjudicating car-hire rates for the past was within the Commission's discretion. Appellants contend that the use of national average costs in an adjudicatory proceeding to determine claims between individual railroads is unlawful. The Commission itself has recognized this distinction between adjudicatory proceedings under 1(11) of the Act and rule making proceedings. *Keith-Ry. Equip. Co. v. Association of Amer. Railroads*, 274 I. C. C. 469, 481 (1949).

Whether the Commission action in adjudicating claims for past per diem was taken pursuant to §1(14)(a) or §1(11) of the Act, there is no authority for the district court's deviation from orthodox principles in determining where the burden of proof lies and how it must be carried. The district court has apparently concluded that the Commission's consolidation of a regulatory proceeding for the determination of prospective per diem charges, with an adjudicatory proceeding for the determination of past charges, has not only created jurisdiction over past car-hire charges (see 1, *supra*) and has relieved the individual complainants in the adjudicatory proceeding of the burden of proof with respect to the mileage factor (see 3, *supra*), but has also relieved complainants of the burden of proof as to their individual costs of car ownership.

Such a result is all the more remarkable because, in determining car-hire rates for the past, the Commission considered its findings "of significance only as an aid to the courts in settling the amount of damages in the pending lawsuits" (332 I. C. C. at 183, Appendix E hereto, p. E8) referring to the District Court for the Southern District of New York and the Supreme Court of the State of New York in which the complainants in ICC Docket 31358 had brought contract and *quantum meruit* actions. (See above, pp. 20-21.) The question thus presented is whether the burden of proof which devolves upon a plaintiff in any civil proceeding can be avoided by obtaining a reference to an administrative agency.

### 6. The Obligation of Car Users to Pay Car-Hire.

If it be assumed that the Commission has jurisdiction under §1(14)(a) or §1(11) to adjudicate past claims for car-hire, the right of car owners to receive thereunder reasonable compensation cannot impose on car users an obligation to pay any more than the car-hire rate which is at the lower limit of the range of reasonably compensatory rates. Since a zone of reasonableness exists and

since the Commission is without power to reject rates which fall therein as unlawful (*cf. Georgia v. Pennsylvania R.R.*, 324 U. S. 439, 460-61 (1945)), the Commission has no power (aside from the use of its regulatory power prospectively to establish uniform rates for all roads) to set car-hire rates unless it first finds that the rates offered are below the zone of reasonableness.

Although the Commission has rejected, as not shown to have been reasonable, the car-hire rates claimed *by* the complainants before it in Docket 31358, the Commission has *not* made any findings as to the reasonableness of the car-hire rates offered *to* the complainants by appellants. Instead, the Commission argued, and the court below held, that there is no zone of reasonableness and that the rates determined by the Commission are the *sole*, just, fair and reasonably compensatory rates.

The question presented therefore is whether there is a zone of reasonableness for car hire charges and, if so, whether the Commission in passing upon claims for past car-hire must make findings as to the reasonableness of the assertedly reasonable rates offered by appellants.

### 7. The Commission and the Procedural Safeguards of the Administrative Procedure Act.

In the course of the proceedings before the Commission, a hearing examiner (Examiner Mittelbronn) assigned to these proceedings was relieved of his assignment under circumstances which indicated possible breaches of those provisions of the Administrative Procedure Act designed to preserve the integrity and independence of hearing examiners, 5 U. S. C. §§556(b) and 554(d). Appellants Boston and Maine and New Haven sought reinstatement of the reassigned examiner (Petitions dated December 24, 1959, February 6, 1960 and April 15, 1960), and even

offered to waive all procedural error if the examiner originally assigned to the proceedings in 1953, Examiner Hosmer, were reassigned to the reopened proceedings.

The Commission rejected appellants' petitions and refused all of appellants' requests for information, including those relating to the Commission's compliance with the provisions of Section 11 of the Administrative Procedure Act, 5 U. S. C. §3105, which establishes procedures for assignment of hearing examiners "in rotation so far as practicable." In its opinion and order dated September 5, 1962 (Appendix G hereto), the Commission denied appellants' requests for copies of the rotation list (if any) maintained by the Commission. And although it catalogued a number of general reasons why assignment of examiners in "strict rotation" might not be practical or even possible, the Commission did not assert any of those reasons to be applicable in this case. Furthermore, the Commission refused to indicate whether or not it attempted to follow any system of rotation for examiners at all, nor would the Commission state whether or not the Commission even maintained a "rotation list" of hearing examiners.

In the court below, appellants served a notice to admit upon defendants and intervening defendants. Among the facts as to which admission was sought were the facts alleged by appellants concerning the circumstances of the substitution of hearing examiners, and the fact that the Commission maintained no system, for application either in this case or in any other, for the assignment of hearing examiners "in rotation." The court below found the notice to admit improper and refused to enforce appellants' notice.

Appellants consider that they have been denied the protection of Sections 5(c), 7(a) and 11 of the Administrative Procedure Act, 5 U. S. C. §§554(d), 556(b) and 3105 and that the court below erred both in failing to enforce appellants' Notice to Admit Facts and in failing to set

aside the order of the Commission in Dockets 31358, 33145 and 34405 for failure to comply with the provisions of the Administrative Procedure Act. The question raised is whether the Administrative Procedure Act prohibits the Commission from changing hearing examiners at will, refusing to recognize any obligation to maintain rotation lists or to appoint examiners in rotation, and clothing its actions and procedures in a shroud of secrecy.

## CONCLUSION

**The Court has jurisdiction of this appeal, and the questions presented hereby are so substantial as to require plenary consideration with briefs on the merits and oral argument.**

s/ M. Lauck Walton

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The Class II, Terminal and Switching Railroads listed at pages 1 and 2 hereof

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## APPENDIX A

INTERSTATE COMMERCE COMMISSION

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No. 31358

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

*v.*

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY (H. K. NORTON, TRUSTEE) ET AL.

Submitted Decided

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Per diem charges of $1.75 and $2 for the use of railroad-owned freight cars wheu on the lines of rail carriers other than their owners in effect prior to August 1, 1953, found reasonable and a charge of $2.10 found reasonable for present use. Declaratory order entered.

*S. R. Brittingham, Jr., R. R. Bongartz, Carson L. Taylor, J. P. Fishwick, F. E. Baukhages, C. C. Howell, E. H. Burgess, D. O. Mathews, Eldon Martin, Edwin C. Matthias, D. S. Wright, B. J. Viviano, Thomas T. Railey, H. Merle Mulloy, J. L. Homire, Seddon G. Boxley, J. T. Suggs, W. C. Plunkett, J. H. Miller, J. L. Rice, R. S. Outlaw, J. H. Wright,*

*E. J. Zoll, Jr., J. Carter Fort, Jr., Alfred W. Hesse, Jr., Martin A. Meyer, Jr.*, and *George W. Holmes* for complainants.

*Carl Newton, Granville Whittlesey, W. J. Hickey, J. W. Grady, H. D. Boynton, Richard Jackson, Lawrence Chaffee, William A. Colton, Richard Swan Buell*, and *Joseph P. Hawryluk* for defendants.

*Hewitt Binett, J. C. Kauffman, Ross L. Thorfinnson, W. H. Parsons, Prime F. Osborn, III, Thurmond A. Miller, M. C. Smith, Jr., Robert D. Brooks, John Colgren, Kemper A. Dobbins, Warren H. Ploeger, W. H. Fitzpatrick, John F. Reilly, Paul F. Robinson*, and *Martin L. Cassell* for intervenors in support of complainants.

*W. J. Hickey, Matthew Crawford*, and *Milton Ferguson* for intervenors in support of defendants.

# REPORT PROPOSED BY HOWARD HOSMER, EXAMINER

The complaint herein was filed September 21, 1953, by 19 of the larger class I railroads listed in the footnote.[1] The defendants include among others 5 class I railroads: Boston and Maine Railroad; The Long Island Railroad Company (William Wyer, Trustee), (the Long Island); The New York, New Haven and Hartford Railroad Company (the New Haven); New York, Susquehanna & Western Railroad Company (the Susquehanna); and the Rutland Railway Corporation. Six short line railroads are also defendants: Atlantic & East Carolina Railway Company; East Tennessee and Western North Carolina Railroad Company; St. Johnsbury & Lamoille County Railroad; The New Jersey and New York Railroad Company (Horace Banta, Trustee); and Mississippi & Skuna Valley Railroad Company. The last named defendant is a class III railroad; the foregoing 5 are class II lines.

[1] The Atchison, Topeka and Santa Fe Railway Company; Atlantic Coast Line Railroad Company; The Baltimore and Ohio Railroad Company; Chicago & Eastern Illinois Railroad; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Great Northern Railway Company; Gulf, Mobile & Ohio Railroad Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; Missouri Pacific Railroad Company (Guy A. Thompson, Trustee); Norfolk and Western Railway Company; The Pennsylvania Railroad Company; Reading Company; The St. Louis-San Francisco Railway Company; Southern Railway Company; The Texas and Pacific Railway Company; The Virginian Railway Company; Wabash Railroad Company.

There are 14 interveners in behalf of the complainants, all of them being class-I railroads. The interveners in behalf of defendants, 57 in number, are railroad carriers principally in classes II and III. All the interveners are listed in the appendix.

The complaint grows out of a disagreement between the complainants and the defendants concerning the reasonableness of per diem charges for the use of railroad-owned freight cars payable by nonowning railroads. In *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I.C.C. 383, decided July 11, 1949, (hereinafter referred to as the 1949 report), the Commission found that the per diem charge of $1.50 per day then in effect was not shown to be either unreasonably high or unreasonably low. Effective November 1, 1949, that charge was increased to $1.75 by action of members of the Association of American Railroads (hereinafter called the AAR) under procedure described in the 1949 report.

The procedure for establishing per diem charges was considered by division 2 of the Commission in *Association of American Railroads Agreement*, 277 I.C.C. 413, and approved as conforming to section 5a of the Interstate Commerce Act. The report included the following paragraph:

> Articles XI and XII accord to each subscriber certain individual rights. The former states that the agreement shall not be construed to prevent or limit recourse to this Commission by any subscriber for any

relief (in pending proceedings, or otherwise) accorded by law in respect of any of the matters covered thereby. The latter (article XII) provides that all subscribers shall have the free and unrestrained right to take independent action either before or after any determination arrived at through the procedure provided for in the agreement.

This agreement became effective October 7, 1950. Under the procedure which it set up the per diem charge was increased to $2, effective May 1, 1952, and to $2.40, effective August 1, 1953.

The Susquehanna, which was not a party to the agreement, notified the complainants in March 1951 that after April 1, of that year it would refuse to pay the charge of $1.75 but would settle on a graduated scale ranging from $1.20 to $2, depending on the age of the car. In 1953 it offered to increase that scale to a range between $1.33 and $2.21. The complainants refused those offers, and the car rentals payable by the Susquehanna are now involved in a number of pending lawsuits.

In June 1953 the Boston & Maine, the New Haven, and the Rutland gave notice of their refusal to pay the charge of $2.40 as well as to pay the former $2 charge after July 31, 1954. Later the Boston & Maine offered to pay on a graduated basis or a flat rate of $1.72 per day. The Long Island in August 1953 advised that it was willing to continue paying a $2 charge but would not accept the $2.40

charge. The Atlantic & East Carolina, St. Johnsbury & Lamoille County, New Jersey & New York, and the Barre & Chelsea have followed a similar course. The situation with respect to present payments by defendants other than those here named is not disclosed.

It is alleged in the complaint that, to the extent that the defendants have paid and are paying or offering to pay charges less than those generally in effect as above indicated, "such payments have been, are and would be unjust, unreasonable and noncompensatory, in violation of paragraphs (4), (10) and (11) of section 1 of the Act; and such action by defendants has been, is and would be disruptive of the 'uniform national basis' of handling per diem, which has been deemed necessary by the Commission in order to facilitate 'the performance of orderly transportation service by railroad in the public interest.' *Association of American Railroads—Agreement, supra,* 423." The prayer of the complaint is that—

> the Commission find and declare that the per diem rates of $1.75 and $2, during the period in which these rates were effective, were just, reasonable, and otherwise lawful, that the current per diem rate of $2.40, effective August 1, 1953, is just, reasonable and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers; and that the Commission grant such other and further relief as may be required in the premises.

The complainants expressly disclaim any intention to invoke the only specific power with respect to per diem which the Commission has, namely by section 1 (14)(a) to establish "the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier)". Such action would involve the entry of an order, which presumably would continue in effect for the indefinite future and, unless it were vacated or modified, would render the present procedure for dealing with per diem charges inoperative.

In a joint answer to the complaint filed by the Boston & Maine, the New Haven, and certain short-line defendants these parties ask "that the Commission find and determine and fix by order the rate or rates for the use of freight cars to be paid by complainants to defendants and by defendants to complainants." The short-line defendants and interveners request in their briefs that the Commission determine and definitely fix the amount of compensation to be paid by a rail carrier when it uses the freight cars of another, but the briefs of the other defendants are less positive. The New Haven and the Boston & Maine ask for a declaration that the present per diem rate is unlawful and as a maximum should not be more than $1.04 per day if it is to be fixed as a single amount. Alternatively they prefer a graduated scale. The Susquehanna asks principally that the graduated scale which it favors be found not unreasonably low or noncompensatory. The Long Island

and the New Jersey & New York urge that the complaint should be dismissed and assert that the Commission is not empowered to prescribe charges for car hire retroactively. As was suggested at the prehearing conference, it appears that the majority of the parties, except the short lines, prefer that the Commission take action in the nature of a declaratory order, which under section 5(d) of the Administrative Procedure Act it may issue "to terminate a controversy or remove uncertainty." Manifestly there is a controversy here and uncertainty as to the measure of just compensation due complainants from the defendants for the use of cars owned by the former.

With the exception of its action in *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659, which was set aside upon judicial review, *Palmer* v. *United States*, 75 F. Supp. 63, the Commission has never undertaken to establish a general basis of per diem charges under its authority in section 1 (14)(a). The present system of rentals in its broad form has been worked out by the railroads themselves. The per diem plan was adopted in 1902 after a mileage system was found to be unsatisfactory for reasons mentioned in *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 375. The charge has been uniform for all types of cars, and up to the time of the present controversy it has applied uniformly to all railroads, subject to the operation of reclaims. In its 1949 report (p. 386) the Commission said:

> For many years the per diem rate has been based on average costs. The daily rental for a car valued at $2,000, for example, is the same as that for a car worth

twice as much. There is no request herein for different per diem rates on freight cars of different ages, sizes, or classes. A carrier which has a foreign railroad car on its rails immediately after midnight pays the rental for that calendar day in the absence of some special agreement. If it receives a car in interchange after midnight and delivers it in interchange before the following midnight, it does not pay any car rental.

Some of the defendants here question the principle of uniformity and introduced evidence in support of their views. These will be discussed before the main issues in the case are considered.

Both the Long Island and the New Jersey & New York, whose lines are partly in the metropolitan area of New York City, perform comparatively short line-hauls in their freight service. The average detention per car in their terminals is high. These defendants believe that the basis of per diem charges should take into account a distinction between items of car-ownership cost attributable to movement use (mileage) and those related to the passage of time. They therefore suggest a basis under which "each using road would pay time costs in proportion to the time that it holds the car and mileage costs in proportion to its own mileage use of the car."

Unless the Commission dismisses the complaint, the Long Island and the New Jersey & New York urge that it—

(a) undertake to determine true freight car ownership costs * * * (b) make an accurate separation of

> such costs between time and mileage; (c) determine separate average unit costs for time and mileage; and (d) fix separate car hire charges for each user road reflecting the average time and mileage costs for which such road is responsible.

Admittedly such a determination could not be made from the evidence in this case. Apparently it would involve a gigantic statistical undertaking. If by that means a scheme of equitable separate charges for individual user roads could be devised, there would be an increase in the labor now required for settling per diem accounts.

The New Haven and the Boston & Maine suggest a plan of per diem charges under which there would be a variation of rates with respect to owner railroads based on the average age of their cars. The Susquehanna also supports this suggestion. According to the sponsors, this plan "by giving higher rent for new than for old cars would furnish an incentive to car owners to renew the fleet and to get rid of old equipment." The steps necessary to carry out the plan are stated as follows:

> Mr. Glacy's program assumed that in each year the AAR would ascertain for each owning railroad the inventory of its cars; ascertain for each group of cars of each railroad the proper charge per day; and derive for each railroad a composite figure which was the weighted average rate per day for its entire fleet. The AAR would then publish a booklet showing each own-

ing railroad's composite rate, which would be the basis.

This plan, too, would necessitate a complicated statistical operation to ascertain the proper composite figure, and it may well be doubted whether the clerical labor required in computing per diem credits would be as simple as the sponsors believe.

As above indicated, the suggested plans for varying per diem charges could not be put into effect without an extensive investigation either by the Commission or by the AAR. The facts and arguments here presented are not deemed persuasive that plans of this kind are desirable. If the Commission should have a different view, however, there would still be a considerable interim in the future in which a single uniform charge would necessarily have to be applied. Furthermore the issue of reasonableness of the present charge and its immediate predecessors raised in this proceeding must be decided.

There is general agreement that car rentals, whether established by the Commission or otherwise, should be reasonably compensatory and no more, *Palmer* v. *United States, supra,* 69. The determination is essentially a problem in cost accounting. The earliest attempt to deal exhaustively with the problem was made 45 years ago by the socalled McCrea commission, composed of 5 railroad presidents. They adopted the principle that the per diem charge should cover (1) repairs, (2) taxes, (3) depreciation, (4) interest on investment, and (5) miscellaneous ex-

pense incidental to ownership. This principle has been generally accepted as valid ever since, but there has been continuing controversy as to how the principle shall be applied. Indeed the members of the McCrea Commission themselves reached three different conclusions on that point.

The principle just referred to serves as a guide for the General Committee of the AAR, which is charged with studying proposals for changes in per diem rates, aided by a subordinate special committee, known as the Subcommittee on Mileage and Per Diem. Costs are allocated to the various categories from expense figures reported to the committees in response to questionnaires sent to car-owning railroads. The General Committee alone decides what proposed changes in the per diem rate shall be recommended to the Board of Directors of the AAR for submission to subscribers to the per diem agreement.

In its 1949 report the Commission discussed the allocations of costs for 1946 presented in support of the per diem charge of $1.50 there in issue. It criticized some of the allocations as too large, but in respect of other important items it made comments which could be interpreted as finding that those items were understated. In an appendix there were shown "averages of such costs as reallocated in the accompanying report" apparently indicating a view that the average cost per active freight car per day was $1.92 in 1947.

It is understandable, therefore, that the complainants lean heavily on the 1949 report, on which they comment in their brief as follows:

> * * * the Commission resolved in favor of the present complainants almost every issue now in dispute, and indicated approval of, if it did not formally prescribe, a formula for the ascertainment of per diem rates which, when applied in this case, establishes the validity of the rates that defendants are here assailing.

If the 1949 report is to be construed as prescribing a formula, the complainants should prevail in the instant case, for that report contains a number of statements highly favorable to their contentions. In the 1949 report, however, the Commission dismissed the complaint in No. 29587, brought by the short lines, which asked the Commission among other things "to promulgate a formula to be employed in the future in determining the lawful compensation to be paid for the use of railroad-owned freight cars." Also it dismissed the complaint in No. 29751, in which six large western lines took the position that the per diem charge of $1.50 was "inadequate, unjust, and noncompensatory." Therefore the soundest interpretation of the 1949 report seems to be that the statements therein were intended to have no significance except as reasons for approving the charge of $1.50 per day.

In this case the complainants seek findings which would approve all per diem charges established after the 1949 report. In each instance the General Committee studied

statistics reported by class 1 railroads in response to questionnaires. Those upon which the charge of $1.75 was based were for 1948, but there was an adjustment to reflect wage rates, material prices, and payroll taxes and other determinable increases up to September 1, 1949. The statistics pertaining to the $2 charge were those for 1950, projected to include cost levels as of April 1951. Full recognition was thus given to the 40-hour week, which was in effect throughout 1950. The present charge of $2.40 was based on figures for 1952. The information for the latter year was received from 121 railroads, having approximately all the freight-car ownership of class 1 railroads. Concerning the latest study, the complainants' principal witness testified that it "came closer to applying the Commission formula [1949 report] than any of its previous studies leading to a per diem adjustment."

*Freight car repairs*—This is the largest single category of expense included in the per diem charge and amounts to about 40 per cent of the total. Also it is used as a basis of allocating certain other costs.

The basic figures for this item are derived from account 314, Freight Train Cars—Repairs, in the accounting classification. The reported total for 1952 was $586,914,603. To this the General Committee added $24,965,504 for switching home freight cars marked for repairs, and deducted $65,887,034 for costs of car users' repairs to foreign cars damaged by them through improper handling, compensation for foreign cars destroyed on car users' lines,

certain switching costs, and a portion of labor costs of inspection and other service at terminal and junction points. The reasons for these adjustments were stated on pp. 390-1 of the 1949 report. The complainants thus estimate the cost of repairs at 97.836 cents per active car day.

In the 1949 report the Commission found that there should have been a further deduction of the costs incurred by car users for inspection of foreign cars not charged back to car owners. The complainants have not seen fit to consider this deduction as part of what they regard as the Commission's formula, approved or prescribed in the 1949 report. They argue:

> It is technically true that the expense is not one which the owner bears immediately and directly but it is one which the owner bears vicariously and by substitution; and nonowners should not be shielded from the impact of this ownership burden.

Applied to the 1952 study the deduction would amount to only about 5 cents per day, a relatively small figure. Nevertheless Commission's reasons for excluding the item seem sound.

The defendants contend that there should be even larger deductions for the expense of car inspection now included in account 314. Some of the defendants would eliminate all inspection costs on the ground, as stated by one of them, that "inspection is obviously primarily for purposes of operation and safety, and with the primary objective of

preventing breakdowns in transportation on the inspecting line, which is the line which is using the cars." Such a sweeping generalization can not be sustained. The instructions published in connection with the accounting classification direct that "the cost of repairs * * * shall include the cost of inspecting to determine the repairs necessary and * * * the cost of inspecting and testing after repairs have been made * * * to determine whether the repairs have been properly made." The cost witness for the short-line parties in effect conceded that inspection costs of this kind may properly be considered maintenance. If there is to be any segregation of inspection costs as between maintenance and transportation, it should follow an authoritative study.

In the 1949 report the Commission said (p. 391):

> Numerous repairs are applied to freight cars when on the lines of railroads other than their owners, and, except for the relatively few due to defects for which the using line is responsible by reason of improper handling, commonly called no-bill repairs, definite sums published in connection with the freight-car interchange rules may be billed against and collected from the owning railroads. Such amounts are revised from time to time, to correspond with changes in labor and material costs, but as the published revisions lag behind changes in price levels, the actual costs, in a period of rising prices, of supplying materials and applying repairs to foreign cars may, and frequently do, exceed the amounts that may be recovered.

Some of the defendants contend here that losses which they and other carriers incur because of their inability to recoup full costs of these repairs both on foreign per diem cars as well as mileage cars should be deducted from the total car repair costs. It is testified for the Boston & Maine that this deficiency is equivalent to nearly 30 per cent of its charges to account 314, and applying this percentage to aggregate car repair costs of $586,914,603 used in the complainant's study, it suggests the elimination of $175,006,186 from that aggregate. It would be very hazardous to make any such adjustment in the absence of fairly complete information bearing on the matter. Other defendants more cautiously suggest only that the situation should be investigated. This attitude seems to be reflected in the recommendation of the Susquehanna that "there should be segregated and eliminated from ownership cost figures all amounts spent by users for the maintenance of cars which are not recoverable by the user from the owner."

The various defendants introduced four cost studies in which the aggregate car-repair figures there shown differ widely. That of the short-line parties shows a total of $498,922,522. The figure in the New Haven study is $457,610,831. Much lower are those of the Boston & Maine, $259,486,694, and of the Susquehanna, $217,158,403. Each of the witnesses who presented these studies is a man of long experience in this field. The wide variations in these figures apparently reflect individual differences in respect of reliance upon conjectural factual data.

Some conjecture of this kind is inescapable because of the comprehensive nature of account 314. It is the largest of the primary operating expense accounts, embracing nearly 10 per cent of total freight expense. It includes "the net loss sustained on account of the destruction of foreign cars" and "amounts paid to others for repairs of freight cars for which the carrier is liable." Among the freight cars covered by the account are cabooses and refrigerator cars. As of November 1, 1953, however, 96.5 per cent of the cars owned by class 1 carriers consisted of box, gondola, hopper, stock, and flat cars, subject to per diem.

The Subcommittee on Mileage and Per Diem in 1951 came to the conclusion that a proper per diem charge could be more readily determined if account 314 could be subdivided and recommended that all the railroads do so beginning with 1952. The Subcommittee found that there was "considerable variation in the practices of various railroads in the charging of inspection costs as between account 314 and account 402." It was of the view that "it would be better if car repairs for cabooses could be eliminated from account 314 and caboose car days eliminated from the freight-car day divisor." The Subcommittee also proposed that there be a separation of repair costs for home cars, foreign cars, and railroad and privately-owned mileage cars, as well as cabooses and a separate showing of cost of classified repairs, running repairs, switching expenses, and credits for sales of scrap. The General Committee disapproved this recommendation because of the additional

expense which would be required for such detailed accounting.

There appears to be good reason for the Commission and the railroads to give careful consideration to the recommendation of the Subcommittee in the interest of removing some of the controversy surrounding this subject. Account 314, as before indicated, includes items of expense which are not related to per diem cars, such as the repairs to cabooses and railroad-owned cars rented on a mileage basis. These expenses should be segregated by special studies currently maintained. However, it is not desirable to delay the decision of this case pending an effort to provide addition data bearing on car repairs. Accordingly, it is concluded that car-repair costs should be determined in the manner specified in the 1949 report.

*Taxes*—In 1952 the class 1 railroads showed a total investment of $32,698,240,806 in property, material, and supplies, upon which they paid property taxes (personal and real) and other taxes in lieu thereof but excluding State income taxes amounting to $319,221,322, a ratio of 0.976 per cent. That ratio is applied to ledger value of freight cars, undepreciated, and a freight-car repair proportion of ledger value, undepreciated, of shops, enginehouses, etc., producing $56,639,614. To this figure was added $23,354,062 as a proper estimated share of payroll taxes, which makes a total of $79,993,676 for taxes. This is translated into a figure of 14.334 cents per active car day for taxes.

The defendants point out that in some important States no ad valorem taxes are levied on freight cars and make certain other criticisms of the complainants' tax allocations. The Susquehanna suggests that the figure of 14.334 cents "should be reduced by at least 50% pending a country-wide analysis leading to calculations based on accurate comprehensive figures." The Boston & Maine is of opinion that in the light of its experience the property-tax figure of $56,639,614 should be reduced by 70%, making it $16,991,884. The reduction would amount to 7 cents per active car-day.

In the absence of more exact figures the complainants' allocation of this expense appears not to be excessive.

*Depreciation*—On this subject the complainants say in their brief:

> In the 1948 and 1950 studies, leading to the $1.75 and $2.00 per diem rates, the General Committee used the carriers' aggregate recorded depreciation as the depreciation element of freight car ownership cost. The depreciation item thus reflected freight car value based on original cost. Prior per diem rates had been similarly calculated.
>
> In [the 1949 report] the Commission discussed the contentions of the parties concerning original cost versus replacement value in connection with depreciation and interest return, and its conclusions are reflected in the observation that:

Carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values.

In conformity with the foregoing statement the Commission computed both depreciation and interest on the basis of replacement value in the formula appended to its report in the prior case.

* * * the General Committee adopted the principle laid down by the Commission, and calculated the annual depreciation charge on the basis of reproduction value. The difference between using original cost and using reproduction value as the depreciation base * * * is the difference between a cost per day of 30.281 cents and 53.598 cents.

The foregoing constitutes the sole justification offered by the complainants for depreciation based on cost of reproduction. They do not undertake to support their position by citation of court decisions or modern accounting practice.

The short-line parties presented as a witness an experienced certified public accountant, who expressed the opinion that depreciation based on cost of reproduction was not in accord with governmental regulations or recognized accounting practice. That view is supported by the general agreement of economists that the purpose of depreciation accounting is not to provide a fund for the replacement of

units of property being retired but to recover the cost of those units in current use.[2]

The holding of the Supreme Court based on a contrary view in *United Railways* v. *West*, 280 U. S. 234, cited in the 1949 report, was expressly overruled in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, commonly known as the *Hope* case. The 1949 report is unique among Commission decisions in suggesting the desirability of using reproduction cost as a basis for depreciation. The question was considered exhaustively 18 years before in *Telephone and Railroad Depreciation Charges*, 177 I.C.C. 351, 372-382, shortly after the decision in *United Railways* v. *West, supra*. There the rail carriers urged "that the operating expense resulting from the retirement of a unit of property is not its original cost but rather the cost of replacing it in kind." The Commission rejected that view, and its comments at pp. 377-8 are pertinent here:

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[2] See Barnes-The Economics of Public Utility Regulation, p. 259; Troxel-Economics of Public Utilities, p. 337; Thompson & Smith-Public Utility Economics, p. 330.

The New York Public Service Commission very recently rejected a suggested method "to protect equity investors in utilities against the rigors of inflation, the use of depreciation calculated not upon the basis of cost or investment but in dollars adjusted to the same purchasing power of the dollar originally committed to the enterprise." *Re New York Telephone Co.*, 5 PUR 3rd 33, 46.

See also Hills—The law of Accounting, 54 Col. L. Rev. 1, 20 (January 1954). The second installment of this paper contains the most recent discussion of the point, id. 1049, 1077-8, (November 1954).

> When depreciation accounting is employed, a further and important objection to the cost of replacement or present value method is that retirement and replacement of the unit do not occur when the depreciation charge is made, and may not occur until many years in the future. If depreciation charges, therefore, are made each year on the basis of the current replacement cost or present value, they may prove to be quite out of line with this cost or value at the time when retirement actually takes place. In view of the constant shift in such costs and values this would indeed, normally be the case, with the result that the depreciation reserve would be either too large or too small. No very satisfactory method of adjusting these irregularities has been suggested. It would also be necessary for us to exercise constant supervision over the depreciation charges, for the determination of current replacement cost or present value is so controversial a matter that it could not safely be left to the discretion of the carriers.

The last sentence above quoted is an example of general recognition of the fact that cost of reproduction can only be estimated, and the process is inherently difficult, involving many assumptions which are at least open to question. This is true even though the estimates are based as they are here on data obtained from the Commission's valuation records.

In determining depreciation to be considered in arriving at a proper per diem rate the basis should be ledger value in accordance with the generally accepted accounting theory.

*Capital Charges*—In connection with this element also the use of cost-of-reproduction is a point of controversy. On this subject the Commission in its 1949 report said: (a. 393)

> An appropriate interest rate, if applied to depreciated ledger cost of freight cars, would not adequately compensate car owners, because such value, averaging $1,092 for freight cars in the service of class 1 railroads at the end of 1946, was 42.3 per cent below their estimated value, averaging $1,891, at that period. Carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values. Inclusion in the per diem rate of an interest charge of 6 per cent on average present value of freight cars, freight repair shops, et cetera, does not appear to be excessive, in view of the fact that a portion of the resulting revenue must be paid out as income taxes.

The complainants are probably justified in asserting that the Commission "held that interest should be computed at 6 per cent on reproduction value," but they do not consider this to be a mandatory requirement. In their brief they say:

In connection with the $2.40 rate the General Committee's averaging method produced an interest on value item for freight cars of 43.588 cents, as against 31.516 cents on depreciated ledger value alone. If the General Committee had followed the Commission's decision and used depreciated reproduction value, the amount included in the per diem computation for interest on freight car value would have been 55.660 cents, and the current rate would be substantially in excess of $2.40.

The "averaging method" above mentioned produced an investment base which was the average of depreciated cost of reproduction and depreciated ledger value. To this a 6-per cent rate of return was applied. The theory followed in determining this base is essentially the same as that of "fair value" which flourished about 25 years ago but has lost most of its significance since the *Hope* case.[3]

It is true, as complainants say, that the Commission's right to recognize reproduction value is not to be questioned, but the 1949 report in its extreme reliance on present value may properly be characterized as anomalous. Long before the *Hope* case, the Commission in 1927 carefully pointed out the weaknesses of the cost-of-reproduction basis in *Excess Income of St. Louis & O'Fallon Ry. Co.*, 124 I.C.C. 3, 28-37. Later in *Petroleum Rail Shippers' Assn.* v. *Alton & S.R.*, 243 I.C.C. 589, 663, the Commission de-

[3] See "The *Hope* Case and Public Utility Valuation in the States (Rose), 54 Col. L. Rev. 188 (May 1954).

termined the value of two pipeline carriers on the basis of original cost less depreciation instead of the lower cost of reproduction. In the general rate-increase cases since 1946 the Commission has adhered to original cost as the principal element in the rate base, *Increased Freight Rates*, 1947, 270 I.C.C. 403, 436; *Increased Freight*, 1951, 284 I.C.C. 589, 607. Even more pertinent here is the decision in *New York, S. & W. R. Co. Abandonment*, 275 I.C.C. 10, in which there was an issue of just compensation to the Susquehanna for transportation service which it performed for the New York Central. At p. 16 of that report the Commission said:

> The Susquehanna maintains that reproduction cost at present-day prices, less depreciation, provides a more fair and equitable basis for determining a fair return on value than original cost less accrued depreciation. The Central insists that the latter factors should be used * * * We likewise consider original cost less depreciation as the most suitable base for the purpose of this case. In any future revisions of the cost study, such base could be quickly and inexpensively determined.

The last sentence above quoted recognizes the fact already pointed out that cost of reproduction is an unstable and indefinite base not readily ascertainable. This objection is sufficiently forceful in itself to justify the sole use of depreciated ledger value as an investment base for present purposes without considering other criticisms of the cost-of-reproduction basis which have caused it to be discredited in the past 10 years.

The choice of a percentage figure to be applied to the investment base must rest necessarily on judgment in a field which has been a battleground of controversy for about half a century. Although all the defendants take much the same position as the Boston & Maine, which asserts that "it would be improper to include anything in the rent base beyond the costs of financing such property—in this instance the interest burden upon a car owner arising out of his acquisition and ownership of a freight car," the only ones making definite recommendations as to a rate of return are the New Haven, the Boston & Maine, and the Susquehanna. The first-named suggests 6 per cent based on ledger value, but the other two say it should be about 4.6 per cent of that value. The latter figure is the result of an averaging process, reflecting among other things the average interest rate of 2.39 per cent on outstanding equipment-trust obligations.

In urging that "the General Committee's formula conservatively understates the legally allowable charge for depreciation and interest return as elements of ownership cost", the complainants stress "risk of ownership" and "burden of replacement" incurred by the car-owning carriers and hint at danger to the national economy "if railroads which have heretofore been willing to sink capital in freight cars should decide that in view of high replacement costs prudence no longer permitted them to contribute their part to the national car fleet, but that they should become car renters rather than car owners."

An intervener, the Chesapeake and Ohio Railway Company, which owns a large number of cars and is consequently one of the principal per diem credit railroads is more specific. It states:

> If the railroads in general, and the Chesapeake and Ohio in particular, are to own the number of cars required by the national economy, the per diem rate must provide adequate compensation after income taxes. If the per diem rate provided a realistic rate of return after income taxes, the railroads, including the Chesapeake and Ohio, would own a larger number of cars and could, in fact, justify increasing rather than reducing their car ownership.

This intervener therefore believes that, far from being reduced, "the prevailing per diem rate of $2.40 per car per day is at least 97 cents too low and should be increased." The further expansion of the 97-cent figure which it suggests would be accomplished by adjustment of the car-day divisor to be discussed later.

Argument over investment base and percentage rate of return should not obscure the practical point involved, which is the number of dollars available by way of rental to a carrier which makes an investment in freight cars for joint use in nationwide transportation service. It seems clear that the car-owning carrier is entitled to a return larger than one based solely on cost of money measured by current interest rates, for in acquiring cars it acts somewhat as an entrepreneur. It must assume the burden of planning and financing the new equipment in the light of

an uncertain demand for cars in general or those of a particular size and type due to unpredictable factors affecting the outlook for rail transportation. In other words, it is not disputed that the per diem charge should take some account of what are termed incentive and risk, but the problem of proper allowance for this consideration is difficult. The appropriate place for such an element, it is believed, is in the rate of return without dividing it between that item and the depreciation charge. Also it seems that the defendants are right that the incentive to build new cars will have more force if rate of return is based on original cost.

Another complication has to do with the impact of income taxes. At a time when such taxes were comparatively trivial, the Supreme Court held that the fairness of a return to a utility should be determined on the basis of what it had left after paying income taxes. The validity of this principle is subject to doubt in the present era of high income taxes,[4] but the Commission gave some weight to income tax liability in the 1949 report.

The six-per cent return on depreciated reproduction value, strongly suggested as proper in that report, was equivalent to a return of approximately 10.6 per cent on depreciated original cost. This return, as the Commission pointed out, would be reduced by income taxes. In the instant case it is concluded that a return of 10 per cent

[4] In Justice Douglas's dissenting opinion in *Vinson* v. *Washington Gas Co.*, 321 U. S. 489, he said: "It is self-evident that the ability to pass present wartime income taxes on to others is a remarkable privilege indeed."

on original cost of freight cars less depreciation would be fair. This would produce a greater amount of money than the allocation for interest in the complainants' studies, but the excess would be much less than the reduction in the allocation for depreciation recommended in this report. Thus the total amount allocated for depreciation on freight cars and interest on the value thereof in complainants' 1952 study is $542,366,675. The corresponding allocation upon the basis here proposed is $462,120,718. On the basis suggested in the 1949 report the allocation for these items would be $609,736,258.

In this report the return on investment in shops, engine-houses, power plants, etc., is based on 6 per cent of depreciated ledger value. This item is relatively unimportant.

*The Car-Day Divisor*—For reasons which are well-known it is generally agreed that surplus and unserviceable cars should be excluded in computing average costs per car day. However, since per diem charges are established for future application, the extent of that exclusion necessarily rests upon an informed guess as to the aggregate number of freight cars which the railroads will own in an indefinite future period, the number which will be unserviceable, and the number which will be idle because of insufficient traffic for their full utilization. The last element, which is closely related to fluctuations in the business cycle, is particularly speculative. Hence the basis of estimating the percentage of active car-days has always been a subject of wide disagreement. The Commission devoted three pages of its 1949 report to this question, and following paragraph on p. 389 indicates its conclusions:

The per diem rate could be revised upward and downward periodically to conform to annual fluctuations in the number of active cars, and if based on the approximate costs of ownership and maintenance and active cars for a designated recent year it could not be said to be unreasonable. Or the rate could be determined by the use of an active-car ratio based, from time to time, on the average number of active cars in use over a representative period of years, and, if predicated on the approximate costs of ownership and maintenance for a designated recent year, the rate so fixed could not be said to be unreasonable. Stated differently, there is a rather wide zone of reasonableness within which the carriers may establish a lawful per diem rate. The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10, or 15 years.

It does not appear that theretofore the railroads had ever considered using a period as long as 20 years for this purpose. In the studies which the AAR presented in connection with the 1949 decision a 10-year period, 1936-1945, was used, and the ratio so arrived at was 86.15 per cent. The 20-year period in the 1949 report covered 1927-1946 and produced a ratio of 80 per cent, the ratio used by the Commission in its "reallocated" costs, which as before shown, were higher than those relied on by the AAR.

Notwithstanding the fact that the Commission's conclusions with respect to the car-utilization ratio were of much potential value to the car-owning railroads, they were not immediately adopted. In the studies which led to the $1.75 charge a period of 15 years, 1934-1948, was used to arrive at a ratio of 86.12 per cent. Originally in the next studies relating to the $2 charge the 15-year period, 1936-1950, was used, and the resulting ratio was 89.13 per cent. However, apparently the General Committee was of the view that due deference to the Commission's views made it advisable to use the 20 years 1931-1950 and thereby reduce the ratio to 82.75 per cent, incidentally increasing the estimated cost by about 15 or 16 cents per day. In the studies on which the present charge was based a 20-year period, 1933-1952, was used, giving a percentage ratio of 86.05 per cent,

In contrast to the ratios above shown, 86.12, 82.75, and 86.05 per cent, are the following actual ratios for the years shown:

| *Year* | *Per cent* |
|---|---|
| 1949 | 90.39 |
| 1950 | 91.34 |
| 1951 | 94.27 |
| 1952 | 93.59 |

If the Commission's observations concerning the 20-year period were intended as a general principle for future guidance of the railroads, the present proceeding affords an appropriate opportunity for further consideration of the question. The period gives undeserved weight to condi-

tions in years prior to 1941 which were in a wholly different economic era from that of succeeding years.

For the period from 1933 to 1940, inclusive, the average annual ownership of cars by class 1 railroads was 1,806,065. Because of depressed industrial activity there were large numbers of surplus cars, and the percentage of unserviceability ranged from 8.8 to 15. The car-utilization ratio consequently ranged from 63.98 in 1933 to 84.16 in 1940.

On the other hand, in the years from 1941 to 1952, inclusive, the class 1 railroads' annual ownership of cars averaged 1,738,696. Those carriers were able to carry the heavy traffic of the war and post-war periods because of the greater average capacity of the cars increased train speeds and other means of greater efficiency, including a reduction in percentage of unserviceability to a range between 2.7 and 6.9. Car surpluses after 1940 were negligible in comparison with those of the earlier period.[5] The car-utilization ratio, therefore, between 1941 and 1952 ranged between 90.39 and 96.67. In 1952, the latest year for which figures are to be found in the record, the ratio was 93.59, as before shown. Although the ratio undoubtedly declined in 1953 and 1954, it is doubted whether the

5 Complainants show that maximum freight-car surpluses in 1933-1940 ranged from 490,370 on March 14, 1940 to 691,587 on January 31, 1933. Minimum surpluses in the same period ranged from 64,209 on October 14, 1939 to 385,137 on October 31, 1933. In the period 1941-1952 maximum surpluses ranged from 23,416 on October 20, 1945 to 207,627 on November 5, 1949. Minimum surpluses ranged from 673 on October 23, 1948 to 38,511 on October 4, 1941.

figure has fallen below 90. If so, supplementary figures may be furnished before submission of the case.

The mere fact that freight cars have an average life of about 20 years affords little or no ground for assuming that their probable utilization in any given future year will be the same as that for the average of the past 20 years. There is no reason to believe that economic cycles are so marked.

If the 20-year period is adopted as a permanent yardstick, the statistics for years from 1941 to 1952 will continue to have a varying influence until 1971. Within that future time there may well be changes which will cause the 1941-1952 period to be regarded as abnormal. By 1960 when the favorable influence of the prewar years will have entirely disappeared there may be less satisfaction with the 20-year yardstick.

For the reasons above indicated it is here concluded that that yardstick should be discarded. The proposed findings therefore reflect a car-utilization ratio of 90 per cent.

*Conclusions*—In accordance with the views before expressed the figures submitted by the complainants have been modified in the following respects: (1) The item for freight-car repairs and the allocations based thereon are treated in the same manner as they were in the 1949 report. (2) Depreciation for freight cars and shops, enginehouses, power plants etc., is based on undepreciated ledger values. (3) Return on investment is based on 10 per cent of depreciated ledger value. (4) Return on investment in shops, enginehouses, power plants, etc., is based on 6 per cent of depreciated ledger value. (5) The car-day divisor is based

on a car-utilization ratio of 90 per cent. The figures as so modified are as follows:

ESTIMATED AVERAGE COSTS PER ACTIVE CAR-DAY[6]

| | 1948 | 1950 | 1952 |
|---|---|---|---|
| | *Cents* | *Cents* | *Cents* |
| Cost of freight-car repairs | 70.01 | 74.06 | 88.42 |
| Deadhead haulage of freight-car repair material | 2.03 | 2.13 | 2.54 |
| Charges to depreciation of freight cars | 24.28 | 26.86 | 28.84 |
| Charges account of maintenance and depreciation of shops | 6.03 | 5.46 | 6.18 |
| Miscellaneous maintenance of equipment accounts | 4.69 | 5.48 | 6.67 |
| Allocated proportion of general expense | 3.20 | 3.58 | 4.48 |
| Interest on freight-car value | 39.46 | 41.19 | 50.03 |
| Interest on value of repair shops | 2.24 | 2.29 | 2.30 |
| Interest on investment in stock of freight-car repair material | 0.50 | 0.53 | 0.63 |
| Interest on working capital | 0.47 | 0.50 | 0.60 |
| Cost of certain taxes | 10.89 | 11.68 | 13.29 |
| Totals | 163.80 | 173.76 | 203.98 |

[6] The working papers underlying these computations are available for inspection in the office of the Cost Finding Section of the Commission's Bureau of Accounts Cost Finding and Valuation.

| | | | |
|---|---|---|---|
| Additional labor, material and payroll taxes to reflect increased cost levels as of May 1, 1949 and wages of January 1, 1949 | 4.96 | | |
| Same as of April 1, 1951 | | 12.07 | |
| Same as of April 1, 1953 | | | 1.81 |
| | 168.76 | 185.83 | 205.78 |

Car ownership adjusted to car utilization ratio of 90 per cent:

1948—583,286,368 car days
1950—578,535,476 " "
1952—585,970,978 " "

As before stated, the Susquehanna refused to pay the charge of $1.75 after April 1, 1951, and it is therefore unnecessary to consider whether the charge was unreasonable before that date. The table above shows a cost of $1.8583 as of April 1, 1951, and therefore indicates that the charge of $1.75 from that date to April 30, 1952, was not unreasonable. Similarly, the table indicates that the average cost in 1952 and 1953 was at least $2.0398, which was slightly higher than the charge of $2 in effect during the greater part of those years. The present charge of $2.40 is considerably higher than the cost of approximately $2.06 shown in the table, and it is therefore concluded that a reasonable charge under present conditions would be $2.10.

The Susquehanna in its requested findings suggests that there is a "zone of reasonableness" sufficiently wide to include the amounts for which it seeks approval as not "unjust or unreasonably low or noncompensatory for the periods of their effectiveness, and were within the zone of reasonableness. Although the Commission at p. 389 of the 1949 report said that "there is a rather wide zone of reasonableness within which the carriers may establish a lawful per diem rate," the statutory authority of the Commission over per diem rates is not so worded as to indicate that the authority may be exercised merely by defining the upper or lower limits of a zone of reasonableness, as in the case of freight rates.

*The Commission should find and declare that the per diem charges of* $1.75 *and* $2 *were reasonable during the periods in which they were effective and that a reasonable charge for present use would be* $2.10.

A declaratory order should be entered.

## APPENDIX

*Interveners in support of Complainants*—The Chesapeake and Ohio Railway Company; Chicago, Rock Island and Pacific Railroad Company; The Delaware and Hudson Railroad Corporation; the Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Louisville and Nashville Railroad Company; Minneapolis, St. Paul and Sault Ste. Marie Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Northern Pacific Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Texas and New Orleans Railroad Company; Western Maryland Railway Company.

*Interveners in support of Defendants*—The Ahnapee and Western Railway Company; Alexander Railroad Company; The Atlantic and Danville Railway Company; Bamberger Railroad Company; Bath and Hammondsport Railroad Company; Beaufort and Morehead Railroad Company (A. T. Leary, Lessee); Belfast and Moosehead Lake Railroad Company; Butte, Anaconda & Pacific Railway Company; Charles City Western Railway Company; Chattahoochee Valley Railway Company; Chesapeake Western Railway; Chicago, West Pullman & Southern Railroad Company; City of Prineville Railway; Craig Mountain Railway Company; Detroit and Mackinac Railway Company; Escanaba and Lake Superior Railroad Company; Flemingsburg and Northern Railroad Company; Fort Dodge, Des Moines & Southern Railway Company; Genesee and Wyoming Rail-

road Company; Georgia, Ashburn, Sylvester & Camilla Railway Company; The Georgia Northern Railway Company; Hampton & Branchville Railroad Company; High Point, Thomasville & Denton Railroad Company; Howard Terminal Railway; Jerseyville & Eastern Railroad Company; Kentucky and Tennessee Railway; Lackawanna and Wyoming Valley Railroad Company (E. McLain Watters, Trustee); Lake Erie, Franklin & Clarion Railroad Company; Lakeland Railway; Live Oak, Perry & Gulf Railroad Company; Maryland and Pennsylvania Railroad Company; Minneapolis, Northfield and Southern Railway; Morehead and North Fork Railroad Company; The Narragansett Pier Railroad Company, Inc.; Nelson & Albemarle Railway Company; Norwood & St. Lawrence Railroad Company; Oregon & Northwestern Railroad Co.; Oregon Pacific and Eastern Railway Company; Paris and Mt. Pleasant Railroad Co.; Pearl River Valley Railroad Company; The Pittsburg & Shawmut Railroad Company; Rahway Valley Company (Rahway Valley Company, Lessee); Roscoe, Snyder and Pacific Railway Company; St. Marys Railroad Company; San Francisco and Napa Valley Railroad; The San Luis Central Railroad Company; Santa Maria Valley Railroad Company; Savannah & Atlanta Railway Company; The South Georgia Railway Company; Tennessee, Alabama & Georgia Railway Company; Trona Railway Company; Ventura County Railway Company; Virginia Blue Ridge Railway; Washington and Old Dominion Railroad; Washington, Idaho & Montana Railway Company.

## APPENDIX B

### INTERSTATE COMMERCE COMMISSION

No. 31358

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.

*v.*

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY ET AL.

Decided October 17, 1955.

Per diem charges of $1.75, $2, and $2.40 for the use of railroad-owned freight cars when on the lines of rail carriers other than their owners, found not in excess of reasonable compensation. Proceeding discontinued.

*S. R. Brittingham, Jr., R. R. Bongartz, Carson L. Taylor, J. P. Fishwick, L. J. Huegel, F. E. Baukhages, C. C. Howell, R. B. Gwathmey, E. H. Burgess, D. O. Mathews, Eldon Martin, Edwin C. Matthias, D. S. Wright, B. J. Viviano, Thomas T. Railey, H. Merle Mulloy, J. L. Homire, Seddon G. Boxley, J. T. Suggs, W. C. Plunkett, E. S. Davis, J. H. Miller, J. L. Rice, A. C. Scott, R. S. Outlaw, J. H. Wright, E. J. Zoll, Jr.,*

*J. Carter Fort, Jr., Alfred W. Hesse, Jr., Martin A. Meyer, Jr.*, and *George W. Holmes* for complainants.

*Hewitt Black, J. C. Kauffman, David L. Farley, Jr., Ross L. Thorfinnson, W. H. Parsons, Prime F. Osborn, III, Thormund A. Miller, M. C. Smith, Jr., Robert D. Brooks, John Colgren, Kemper A. Dobbins, Warren H. Ploeger, W. H. Fitzpatrick, John F. Reilly, Paul F. Robinson, Martin L. Cassell, Eaton Adams, Francis J. Melia, D. D. Dart, M. L. Countryman, Jr., Matthew Crawford*, and *Milton Ferguson* for interveners in support of complainants.

*Carl E. Newton, Granville Whittlesey, Jr., W. J. Hickey, J. M. Hood, J. W. Grady, W. J. Mykowski, H. D. Boynton, Richard Jackson, Lawrence Chaffee, William A. Colton, Richard Swan Buell*, and *Joseph P. Hawrylak* for defendants.

*W. J. Hickey* for interveners in support of defendants.

## REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the report proposed by the examiner, and replies thereto, were filed by the parties, except interveners listed in the footnote.[1] We have heard oral argument. Our conclusions differ in part from those of the examiner. Exceptions and requested findings not specifically discussed

[1] The following carriers intervened in support of the complainants but did not join in their exceptions: Erie Railroad Company, Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, Southern Pacific Company, Texas and New Orleans Railroad Company, Western Maryland Railway Company, and The Pittsburgh & Shawmut Railroad Company.

in this report nor reflected in our findings or conclusions have been considered and found not justified.

This complaint was filed on September 21, 1953, by 19 of the larger class I railroads.[1] The defendants include, among others, 5 class I railroads: Boston and Maine Railroad; The Long Island Railroad Company (William Wyer, Trustee), called the Long Island; The New York, New Haven and Hartford Railroad Company, called the New Haven; New York, Susquehanna & Western Railroad Company, called the Susquehanna; and Rutland Railway Corporation. Six short line railroads are also defendants: Atlantic & East Carolina Railway Company; Barre and Chelsea Railroad Company; East Tennessee and Western North Carolina Railroad Company; St. Johnsbury & Lamoille County Railroad; The New Jersey and New York Railroad Company (Horace Banta, Trustee); and Mississippi & Skuna Valley Railroad Company. The last-named defendant is a class III railroad; the preceding 5 are class II lines.

There are 15 interveners in behalf of the complainants, all of them being class I railroads. The interveners in be-

[1] The Atchison, Topeka and Santa Fe Railway Company, Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Chicago & Eastern Illinois Railroad Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Great Northern Railway Company, Gulf, Mobile & Ohio Railroad Company, Illinois Central Railroad Company, Lehigh Valley Railroad Company, Missouri Pacific Railroad Company (Guy A. Thompson, Trustee), Norfolk and Western Railway Company, The Pennsylvania Railroad Company, Reading Company, The St. Louis-San Francisco Railway Company, Southern Railway Company, The Texas and Pacific Railway Company, The Virginian Railway Company, and Wabash Railroad Company.

half of the defendants, 56 in number, are rail carriers principally in classes II and III. All of the interveners are listed in the appendix hereto.

The complaint grows out of a disagreement between the complainants and the defendants concerning the reasonableness of per diem charges for the use of railroad owned freight cars payable by nonowning railroads. In *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I.C.C. 383, decided July 11, 1949, hereinafter referred to as the 1949 report, we found that the per diem charge of $1.50 per day then in effect was not shown to be either unreasonably high or unreasonably low. Effective on November 1, 1949, that charge was increased to $1.75 by action of members of the Association of American Railroads, hereinafter called the AAR, under procedure described in the 1949 report.

The procedure for establishing per diem charges was considered by division 2 in *Association of American Railroads Agreement*, 277 I.C.C. 413, and approved as conforming to section 5a of the Interstate Commerce Act. The report included the following paragraph:

> Articles XI and XII accord to each subscriber certain individual rights. The former states that the agreement shall not be construed to prevent or limit recourse to this Commission by any subscriber for any relief (in pending proceedings, or otherwise) accorded by law in respect of any of the matters covered thereby. The latter (article XII) provides that all subscribers shall have the free and unrestrained right to take independent action either before or after any determination arrived at though the procedure provided for in the agreement.

This agreement became effective on October 7, 1950. Under the procedure which it set up the per diem charge was increased to $2, effective on May 1, 1952, and to $2.40 on August 1, 1953.

The Susquehanna, which was not a party to the agreement, notified the complainants in March 1951 that after April 1 of that year it would refuse to pay the charge of $1.75 but would settle on a graduated scale ranging from $1.20 to $2, depending on the age of the car. In 1953 it offered to increase that scale to a range between $1.33 and $2.21. The complainants refused those offers, and the car rentals payable by the Susquehanna are now involved in a number of pending lawsuits.

In June 1953 the Boston & Maine, the New Haven, and the Rutland gave notice of their refusal to pay the charge of $2.40, as well as the former $2 charge after July 31, 1954. Later, the Boston & Maine offered to pay on a graduated basis or a flat rate of $1.72 per day. The Long Island in August 1953 advised that it was willing to continue paying a $2 charge but would not recognize the $2.40 charge. The Atlantic & East Carolina, St. Johnsbury & Lamoille County, New Jersey & New York, and Barre & Chelsea have followed a similar course. The situation with respect to present payments by the defendants other than those here named is not disclosed.

It is alleged in the complaint that, to the extent that the defendants have paid and are paying or offering to pay charges less than those generally in effect as above indicated, "such payments have been, are and would be unjust, unreasonable and noncompensatory, in violation of para

graphs (4), (10), and (11) of section 1 of the Act; and such action by defendants has been, is and would be disruptive of the 'uniform national basis' of handling per diem, which has been deemed necessary by the Commission in order to facilitate 'the performance of orderly transportation service by railroad in the public interest.' *Association of American Railroads—Agreement, supra*, 423." The prayer of the complaint is that

> the Commission find and declare that the per diem rates of $1.75 and $2, during the periods in which these rates were effective, were just, reasonable, and otherwise lawful, that the current per diem rate of $2.40, effective August 1, 1953, is just, reasonable and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers; and that the Commission grant such other and further relief as may be required in the premises.

The complainants expressly disclaim any intention to invoke the only specific power with respect to per diem which we have, namely, in section 1 (14)(a) of the Interstate Commerce Act to establish "the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier, * * *." Such action would involve the entry of an order, which presumably would continue in effect for the indefinite future and, unless it were vacated or modified, would render the present procedure for dealing with per diem charges inoperative.

In one of the complaints considered in our 1949 decision, No. 29587, the complainants, which were short-line railroads, asked that we promulgate a formula to be employed in the future in determining the lawful compensation to be paid for the use of railroad-owned freight cars. The pleadings in the instant case raised no such issue.

In a joint answer to the complaint filed by the Boston & Maine, the New Haven, and certain short-line defendants, these parties ask "that the Commission find and determine and fix by order the rate or rates for the use of freight cars to be paid by complainants to defendants and by defendants to complainants." The short-line defendants and intervenors requested in their briefs that we determine and definitely fix the amount of compensation to be paid by a rail carrier when it uses the freight cars of another; but the briefs of the other defendants were less positive.

The New Haven and the Boston & Maine asked for a declaration that the present per diem rate is unlawful and as a maximum should not be more than $1.04 per day if it is to be fixed as a single amount. Alternatively, they expressed preference for a graduated scale. The Susquehanna asked principally that the graduated scale which it favored be found not unreasonably low or noncompensatory. The Long Island and the New Jersey & New York urged that the complaint be dismissed, and asserted that we are not empowered to prescribe charges for car hire retroactively.

In their exceptions to the proposed report, the defendants generally go beyond the positions taken in their briefs above described, and request that a formula for the determination of per diem charges be prescribed. Under such a formula,

according to one of the defendants, "the carriers would be required to get exact and complete figures and to make the computations themselves, with the right of recourse to the Commission in the event an agreement could not be reached." This contention is outside the scope of the proceeding as developed in the pleadings, and such a disposition would hardly be desirable except in a proceeding to which all rail carriers were parties.

At a prehearing conference it was suggested that findings such as those sought by the complainants might be in the nature of a declaratory order, as authorized by section 5(d) of the Administrative Procedure Act. Later, some of the defendants, as above pointed out, made requests for findings which appeared to be of the same nature. In exceptions to the proposed report, which recommended action under that section, the defendant New Haven questions the applicability of a declaratory order to the present controversy.

The declaratory order is a relatively new administrative remedy, and no definite limits to its use as yet have been set. The power of issuance is committed to the agency "in its sound discretion . . . to terminate a controversy or remove uncertainty." Manifestly, a controversy exists here, and we consider that a declaratory order would be appropriate.

With the exception of our decision in *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659, which was set aside on judicial review (*Palmer* v. *United States*, 75 F. Supp. 63), we have never undertaken to establish a general basis of per diem charges under our authority in section 1(14)(a)

of the act, but have considered such charges in a number of cases arising on formal complaints. The present system of rentals in its broad form has been worked out by the railroads themselves. The per diem plan was adopted in 1902 after a mileage system was found to be unsatisfactory for reasons mentioned in *Rules for Car-Hire Settlement,* 160 I.C.C. 369, 375. The charge has been uniform for all types of freight cars, and up to the time of the present controversy it has applied uniformly to all railroads, subject to the operation of reclaims. In our 1949 report (page 386), we said:

> For many years the per diem rate has been based on average costs. The daily rental for a car valued at $2,000, for example, is the same as that for a car worth twice as much. There is no request herein for different per diem rates on freight cars of different ages, sizes, or classes. A carrier which has a foreign railroad car on its rails immediately after midnight pays the rental for that calendar day in the absence of some special agreement. If it receives a car in interchange after midnight and delivers it in interchange before the following midnight, it does not pay any car rental.

Some of the defendants here question the principle of uniformity and introduce evidence in support of their views. These will be discussed before the main issues in the case are considered.[1]

[1] Both the Long Island and the New Jersey & New York, whose lines are partly in the metropolitan area of New York City, perform comparatively short line hauls in their freight service. The average detention per car in their

terminals is high. These defendants believe that the basis of per diem charges should take into account a distinction between items of car-ownership cost attributable to movement use (mileage) and those related to the passage of time. They therefore suggest a basis under which "each using road would pay time costs in proportion to the time that it holds the car and mileage costs in proportion to its own mileage use of the car."

Unless we dismiss the complaint, the Long Island and the New Jersey & New York urge that we

> (a) undertake to determine true freight car ownership costs * * *; (b) make an accurate separation of such costs between time and mileage; (c) determine separate average unit costs for time and mileage; and (d) fix separate car hire charges for each user road reflecting the average time and mileage costs for which such road is responsible.

Admittedly, such a determination could not be made from the evidence in this case; moreover, it would involve a long and complicated statistical undertaking. If by that means a scheme of equitable separate charges for individual user roads could be devised, there would be an increase in the labor now required for settling per diem accounts.

The New Haven and the Boston & Maine suggest a plan of per diem charges under which there would be a variation of rates with respect to owner railroads based on the average age of their cars. The Susquehanna also supports this suggestion. According to the sponsors, this plan "by giving higher rent for new than for old cars would furnish

an incentive to car owners to renew the fleet and to get rid of old equipment." The steps necessary to carry out the plan are stated as follows:

> Mr. Glacy's program assumed that in each year the AAR would ascertain for each owning railroad the inventory of its cars; ascertain for each group of cars of each railroad the proper charge per day; and derive for each railroad a composite figure which was the weighted average rate per day for its entire fleet. The AAR would then publish a booklet showing each owning railroad's composite rate, which would be the basis.

This plan, too, would necessitate a complicated statistical operation to ascertain the proper composite figure, and it may well be doubted whether the clerical labor required in computing per diem credits would be as simple as the sponsors believe.

As above indicated, the suggested plans for varying per diem charges could not be put into effect without an extensive investigation either by this Commission or by the AAR. The facts and arguments here presented are not persuasive that plans of this kind are desirable.

There is general agreement that car rentals, however established, should be reasonably compensatory and no more. *Palmer v. United States*, *supra*, page 69. The determination is basically a problem in cost accounting. The earliest attempt to deal exhaustively with the problem was made 45 years ago by the so-called McCrea Commission, composed of 5 railroad presidents. They adopted the prin-

ciple that the per diem charge should cover repairs, taxes, depreciation, interest on investment, and miscellaneous expense incidental to ownership. This principle has been generally accepted as valid ever since, but there has been continuing controversy as to how it should be applied. Indeed, the members of the Meyer Commission themselves reached three different conclusions on that point.

The principle just referred to serves as a guide for the General Committee of the AAR, which is charged with studying proposals for changes in per diem rates, aided by a subordinate special committee, known as the Subcommittee on Mileage and Per Diem. Costs are allocated to the various categories from expense figures reported to the committees in response to questionnaires sent to car owning railroads. The General Committee alone decides what proposed changes in the per diem rate shall be recommended to the Board of Directors of the AAR for submission to subscribers to the per diem agreement.

In the 1942 report, we discussed the allocations of costs for 1940 presented in support of the per diem charge of $1.50 there in issue. We criticized some of the allocations as too large, but in respect of other important items we made comments which have been interpreted as finding that those items were understated.

In that report, however, we dismissed the complaint in No. 28087, filed by the short lines, in which we were asked, among other things, "to promulgate a formula to be employed in the future in determining the lawful expense

tion to be paid for the use of railroad owned freight cars. Also, we dismissed the complaint in No. 29731, in which 6 large western rail carriers took the position that the per diem charge of $1.80 was "inadequate, unjust, and non-compensatory."

In this case the complainants seek findings which would approve all per diem charges established after the base period. In each instance the General Committee studied statistics reported by class I railroads in response to questionnaires. Those upon which the charge of $1.75 was based were for 1948, but there was an adjustment to reflect wage rates, material prices, payroll taxes, and other determinable increases up to September 1, 1949.

The statistics pertaining to the $2 charge were those for 1951, projected to include cost levels as of April 1952. Full compensation was thus given for the 40 hour week, which was in effect throughout 1952. The present charge of $2.10 was based on figures for 1953. The information for the latter case was received from 131 railroads, but no appearance made at the freight-car ownership of class I railroads concerning the basis of study, the complainants' principal witness asserted that it "came closer to applying the Commission formula [1949] to cost than any of its previous studies leading to a per diem adjustment."

*Repair expenses.* This is the largest single category of expense included in the per diem charge and amounts to about 40 per cent of the total. Also, it is usual as a basis of allocating certain other costs. The basic factors for this

item are derived from account 314, Freight Train Car Repairs, in the accounting classification. The reported total for 1962 was $580,914,603. To this, the General Committee added $24,865,504 for switching home freight cars marked for repairs, and deducted $63,887,934 for costs of car owners' repairs to foreign cars damaged by them through improper handling, compensation for foreign cars destroyed on car owners' lines, certain switching costs, and a portion of labor costs of inspection and other service at terminal junction points. The reasons for these adjustments were stated on pages 490 and 491 of the 1940 report. The complainants thus estimate the cost of repairs at 92.86 cents per active car day.

In the 1940 report we found that there should have been a further deduction of the costs incurred by car owners for inspection of foreign cars not charged back to car owners. Applied to the 1962 study, the deduction would amount to only about 4 cents per day, a relatively small figure. The complainants have not seen fit to consider this deduction as a part of what they regard as our formula, approved or otherwise, in the 1940 report. They argue:

> It is technically true that the expense is not one which the owner bears immediately and directly but it is one which the owner bears vicariously and by subterfuge, and nonowners should not be shielded from the impact of this nonexistent burden.

The defendants contend that there should be even larger deductions for the expense of car inspection now included

to account 314. Some of the defendants would eliminate all inspection costs on the ground, as stated by one of them, that "inspection is obviously primarily for purposes of operation and safety, and with the primary objective of preventing breakdown of transportation on the inspecting line, which is the line which is using the cars." Such a sweeping generalization can not be sustained. The instructions published in connection with the accounting classification direct that "the cost of repairs * * * shall include the cost of inspecting to determine the repairs necessary and * * * the cost of inspecting and testing after repairs have been made * * * to determine whether the repairs have been properly made." The cost witness for the short line carriers testified that inspection costs of this kind [illegible] inspection costs [illegible] inspection [illegible] inspection [illegible] [illegible] [illegible]

to price levels, the actual costs, in a period of rising prices, of supplying materials and applying repairs to foreign cars may, and frequently do, exceed the amount that may be recovered.

Some of the defendants contend that losses which they and other carriers incur because of their inability to recoup full costs of these repairs, both on foreign per diem cars and on mileage cars, should be deducted from the total car repair costs. It is testified for the Boston & Maine that this deficiency is equivalent to nearly 30 per cent of its charges to account 414 and applying this percentage to aggregate car repair costs of $[illegible] used in the complainants' study, it suggests the elimination of $[illegible] from that aggregate. It would be very hazardous to make such a deduction in the absence of fairly complete information bearing on this suggestion. Other defendants more cautiously suggest only that the situation should be investigated. The attitude seems to be reflected in the recommendation of the Susquehanna that "there should be segregated and eliminated from owner-repair figures all charges that may be [illegible] for the maintenance of cars which are not recoverable by the user from the owner."

The various defendants introduced four cost studies in which the aggregate car repair figures there shown differ widely. That of the short line parties shows a total of $[illegible]. The figure in the New Haven study is $[illegible]. Much lower are those of the Boston & Maine, $[illegible], and of the Susquehanna, $[illegible]. Each

That question was resolved together with the closely related element of interest return, when we stated in the 1949 report as follows:

> Carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values.

Thus, both interest and depreciation, excepting a minor item of depreciation on fixed facilities, were calculated on the basis of reproduction cost for the purposes of determining a reasonable per diem charge in the 1949 proceeding.

Reviewing the matter for the purposes of this proceeding we note from the evidence now before us that the present day prices are still well above the levels of an era when many of the cars were purchased. Data of record show a range of freight car prices from 1938 to 1952, from $2,069 to $5,859 for box cars and $2,278 to $5,811 for gondola and hopper cars.

A witness for the short lines expressed the opinion that depreciation based on cost of reproduction was not in accord with governmental regulations or recognized accounting practice. That opinion is supported by some accountants and economists who believe that the purpose of depreciation accounting is not to provide a fund for the replacement of units of property being retired, but rather to recover the cost of those units in current use. In their exceptions to the proposed report, the complainants and the interveners which support them put much emphasis on

views of a group of recent writers in the field of public
lity regulation which "recognizes the unreality of origi
cost valuation and believes that something should be
e about it." Some of these writers have suggested an
ated a basis sometimes called economic or value de
ciation.

*United Railways* v. *West*, 280 U.S. 234, cited in our
report, the Supreme Court held that an allowance for
ual depreciation should be based on present value and
on cost. That decision was overruled by the Court in
*eral Power Com.* v. *Hope Natural Gas Co.*, 320 U.S.
commonly referred to as the *Hope* case. Shortly after
at decision we had occasion to consider the question
*ephone and Railroad Depreciation Charges*, 177 I.C.C.
382. There the rail carriers urged "that the oper
expense resulting from the retirement of a unit of
erty is not the original cost but rather the cost of
acing it in kind." Our comments, at pages 377 and 378,
as follows:

When depreciation accounting is employed, a further
nd important objection to the cost of replacement or
resent value method is that retirement and replace
ent of the unit do not occur when the depreciation
harge is made, and may not occur until many years in
e future. If depreciation charges, therefore, are made
ach year on the basis of the current replacement cost
present value, they may prove to be quite out of
e with this cost or value at the time when retirement

actually takes place. In view of the constant shift in such costs and values, this would indeed normally be the case, with the result that the depreciation reserve would be either too large or too small. No very satisfactory method of adjusting these irregularities has been suggested. It would also be necessary for us to exercise constant supervision over the depreciation charges, for the determination of current replacement cost or present value is so controversial a matter that it could not safely be left to the discretion of the carriers.

We realize that in determining depreciation the prevailing accounting practice is to use the ledger value, and we are not here concerned with the propriety of that practice. Our problem here is to determine the justness and reasonableness of the per diem rates in effect during the respective periods referred to and, at present. In reaching such a determination we would be less than realistic if we failed to take into consideration, as pointed out in the 1949 report, that carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values. Failure to do so would cast an undue burden upon the car owners and favor unduly those who pay rentals.

In a special study such as is involved here we may consider the annual depreciation charges on freight cars for any given year, say 1952, which result from a normal application of the average prescribed rate to undepreciated

dger value, and also bear in mind the replacement cost
el. A ready device or tool for use in measuring the
rtcomings of normal depreciation charges, from the
ndpoint of replacement, exists in our own reproduction
t new figure at the 1952 spot price level. These figures,
ich are of record, show an index relation of the repro-
tion cost new value of freight cars as of December 31,
2, $9,587,048,000 (replacement in kind), to ledger value,
$16,365,331 (original cost), of 177. We may apply this
io to the normal depreciation charges to bring them up
hat level, which would embrace replacement considera-
ns, or we may simply apply the average depreciation
to the reproduction cost new value with, of course,
same result. Applying the 1952 average depreciation
of 3.12 per cent to the reproduction cost new total of
$7,048,000 results in depreciation charges of $299,
898.

or the foregoing reasons, we are persuaded that in
rmining depreciation to be considered in passing upon
ompensatory character of per diem charges, the basis
ld be the undepreciated reproduction value.

*pital charges.* With respect to this element, also, the
cost and reproduction is in controversy. In our 1949
t (page 393) we said:

The short line complainants contend that any inter-
st charge on the value of freight cars, repair shops, et
etera, should be based on depreciated ledger cost.
Certain other carriers urge the use of depreciated
eproduction cost new, termed present value, and in

clusion in the per diem rate of interest charges reflecting a rate of 6 per cent. * * * Inclusion in the per diem rate of an interest charge of 6 per cent on average present value of freight cars, freight repair shops, et cetera, does not appear to be excessive, in view of the fact that a portion of the resulting revenue must be paid out as income taxes.

In their brief, the complainants say:

> In connection with the $2.40 rate the General Committee's averaging method produced an interest on value item for freight cars of 43.588 cents, as against 31.516 cents on depreciated ledger value alone. If the General Committee had followed the Commission's decision [1949 report] and used depreciated reproduction value, the amount included in the per diem computation for interest on freight car value would have been 55.660 cents, and the current rate would be substantially in excess of $2.40.

The "averaging method" above mentioned produced an investment base which was the average of depreciated cost of reproduction and depreciated ledger value. To this base a 6-per cent rate of return was applied. The theory followed in determining this base is essentially the same as that of "fair value", which flourished about 25 years ago. In the *Hope* case and others the Supreme Court pointed out that there are various permissible ways in which any rate base on which the return is computed may be arrived at, and that the result reached rather than the method employed is controlling.

The choice of a percentage figure to be applied to the investment base is a point of much controversy. Although all of the defendants take substantially the same position as the Boston & Maine, which asserts that "it would be improper to include anything in the rent base beyond the costs of financing such property—in this instance the interest burden upon a car owner arising out of his acquisition and ownership of a freight car," the only ones making definite recommendations as to a rate of return are the New Haven, the Boston & Maine, and the Susquehanna. The first-named suggests 6 per cent based on ledger value, while the latter two carriers contend that the basis used should be about 4.6 per cent of that value. The latter figure is the result of an averaging process, reflecting, among other things, the average interest rate of 2.39 per cent on outstanding equipment-trust obligations. The complainants stress "risk of ownership" and "burden of replacement" incurred by the car-owning carriers, and hint at the danger to the national economy if railroads which have heretofore been willing to sink capital in freight cars should decide that in view of high replacement costs, prudence no longer permitted them to contribute their part to the national car fleet, but that they should become car renters rather than car owners.

An intervener, The Chesapeake and Ohio Railway Company, which owns a large number of cars and is consequently one of the principal per diem credit railroads, is more specific. It states:

> If the railroads in general, and the Chesapeake and Ohio in particular, are to own the number of cars required by the national economy, the per diem rate must provide adequate compensation after income taxes. If the per diem rate provided a realistic rate of return after income taxes, the railroads, including the Chesapeake and Ohio, would own a larger number of cars and could, in fact, justify increasing rather than reducing their car ownership.

This intervener, therefore, believes that, far from being reduced, the prevailing per diem rate of $2.40 per car per day is at least 97 cents too low and should be increased. The further expansion of the 97-cent figure which it suggests would be accomplished by adjustment of the car-day divisor to be discussed later.

Argument over investment base and percentage rate of return should not obscure the practical point involved, which is the number of dollars available by way of rental to a carrier which makes an investment in freight cars for joint use in nationwide transportation service. It seems clear that the car-owning carrier is entitled to a return larger than one based solely on cost of money measured by current interest rates, for in acquiring cars it acts somewhat as an entrepreneur. It must assume the burden of planning and financing the new equipment in the light of an uncertain demand for cars in general or those of a particular size and type due to unpredictable factors affecting the outlook for rail transportation. In other words, in determining a fair per diem charge some consideration

should be given to what are termed incentive and risk, and an appropriate place for such an element is in the capital charge.

In our 1949 report we stated that an interest charge of 6 per cent of present value of freight cars did not appear to be excessive. We adhere to that view on the instant record.

*The car-day divisor.*—For reasons which are well-known, it is generally agreed that surplus and unserviceable cars should be excluded in computing average costs per car-day. However, since per diem charges are established for future application, the extent of that exclusion necessarily rests upon an estimate as to the aggregate number of freight cars which the railroads will own in an indefinite future period, the number which will be unserviceable, and the number which will be idle because of insufficient traffic for their full utilization. The last element, which is closely related to fluctuations in the business cycle, is particularly speculative. In the past, average figures for various periods of years have been used in determining the car-day divisor, but other plans have also been considered. After discussing some of those plans at page 389 of our 1949 report, we said:

> The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10, or 15 years.

It does not appear that theretofore the railroads had ever considered using a period as long as 20 years for this

purpose. In the studies upon which the charge of $1.50 approved in our 1949 decision was based, a 10-year period, 1936 to 1945, was used, and the ratio so arrived at was 86.15 per cent. The 20-year period suggested in the 1949 report covered 1927 to 1946, and produced a ratio of 80 per cent. In the studies which led to the $1.75 charge a period of 15 years, 1934 to 1948, was used to arrive at a ratio of 86.12 per cent. Originally, in the next studies relating to the $2 charge, a 15-year period, 1936 to 1950, was used, and the resulting ratio was 89.13 per cent. However, the General Committee considered it advisable to use the 20 years, 1931 to 1950, and thereby reduce the ratio to 82.75 per cent, incidentally increasing the estimated cost by about 15 cents a day. In the studies on which the present charge was based, a 20-year period, 1933 to 1952, was used, giving a ratio of 86.05 per cent.

In contrast to the foregoing ratios of 86.12, 82.75, and 86.05 are the following actual ratios for the years shown:

| *Year* | *Per cent* |
|---|---|
| 1949 | 90.39 |
| 1950 | 91.34 |
| 1951 | 94.27 |
| 1952 | 93.59 |

From 1933 to and including 1940, the average annual ownership of cars by class I railroads was 1,806,065. Because of depressed industrial activity, there were large numbers of surplus cars, and the percentage of unserviceability ranged from 8.8 to 15. The car-utilization ratio

consequently ranged from 63.98 per cent in 1933 to 84.16 per cent in 1940. From 1941 to 1952, inclusive, the class I railroads' annual ownership of cars averaged 1,738,696. Because of the greater average capacity of the cars, increased train speeds, and other means of greater efficiency, including a reduction in the percentage of unserviceability, which ranged from 2.7 to 6.9 per cent, those carriers were able to carry the heavy traffic of the war and post-war periods. Car surpluses after 1940 were negligible in comparison with those of the earlier period.[3] The car-utilization ratio, therefore, between 1941 and 1952 ranged from 90.39 to 96.67. In 1952, the latest year for which figures are of record, the ratio was 93.59. The average for the 5 years, 1948 to 1952, was 92.82, and the average for the 15-year period up to and including 1952 was 91.05 per cent. Taking note of the decline in railroad traffic in 1953 and 1954, the examiner in his proposed report suggested the use of a ratio of 90 per cent as representative of current conditions, subject to verification by actual figures for those years. The complainants in their exceptions do not question the accuracy of the 90-per cent ratio, although they contend that it would be more reasonable to apply a ratio of 86 per cent.

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[3] Complainants show that maximum freight-car surpluses in 1933 to 1940 ranged from 190,370 on March 14, 1940 to 691,587 on January 31, 1933. Minimum surpluses in the same period ranged from 64,299 on October 14, 1939 to 385,137 on October 31, 1933. In the period 1941 to 1952, maximum surpluses ranged from 23,416 on October 20, 1945 to 207,627 on November 5, 1949, and minimum surpluses from 673 on October 23, 1948 to 38,511 on October 4, 1941.

Upon consideration of the matter of the car-day divisor in the light of present evidence, we affirm the finding in the 1949 report that a 20-year period would produce more accurate results than a shorter period. The record does not afford a 20-year experience of car use prior to 1948; accordingly, a 15-year period will be used up to and including that year. We conclude that, for the purpose of determining the compensatory character of the respective per diem charges here under investigation, the reasonable car-day divisors to be used are 86.12 per cent for the 15-year period 1934 to 1948, 82.75 per cent for the 20-year period 1931 to 1950, and 86.05 per cent for the 20-year period 1933 to 1952.

*Conclusions.*—In accordance with the foregoing views, the figures submitted by the complainants have been adjusted or modified in the following respects: (1) The items representing freight-car repairs and the allocations based thereon are treated in the same manner as corresponding items were treated in the 1949 report, which eliminates certain costs incurred by car-users covering inspection of foreign cars not charged back to the car-owners; (2) depreciation for freight cars is based on undepreciated reproduction value; (3) depreciation for fixed facilities, such as shops, enginehouses, and power plants, a relatively minor item, is based on undepreciated ledger value; (4) return on investment in freight cars, shops, enginehouses, power plants, et cetera, is based on 6 per cent of depreciated reproduction value; and (5) the car-day divisor is based on car-utilization ratios for the respective periods as above noted. The figures as so modified are as follows:

## Estimated Average Costs Per Active Car-day

| | 1948 | 1950 | 1952 |
|---|---|---|---|
| | *Cents* | *Cents* | *Cents* |
| Cost of freight-car repairs | 73.131 | 80.591 | 92.591 |
| Deadhead haulage of freight-car repair material | 2.117 | 2.315 | 2.664 |
| Charges to depreciation of freight cars | 43.865 | 51.379 | 53.452 |
| Charges account of maintenance and depreciation of shops | 6.297 | 5.942 | 6.467 |
| Miscellaneous maintenance of equipment accounts | 4.901 | 5.962 | 6.986 |
| Allocated proportion of general expense | 3.339 | 3.891 | 4.691 |
| Interest on freight-car value | 41.946 | 50.292 | 55.508 |
| Interest on value of repair shops | 4.093 | 4.228 | 4.651 |
| Interest on investment in stock of freight-car repair material | 0.524 | 0.573 | 0.659 |
| Interest on working capital | 0.494 | 0.545 | 0.632 |
| Cost of certain taxes | 11.369 | 12.708 | 13.916 |
| Totals | 192.076 | 218.426 | 242.217 |

| | | | |
|---|---|---|---|
| Additional labor, material, and payroll taxes to reflect increased cost levels as of May 1, 1949, and wages as of January 1, 1949 | 5.179 | | |
| Same as of April 1, 1951 | | 13.134 | |
| Same as of April 1, 1953 | | | 1.899 |
| | 197.255 | 231.56 | 244.116 |

Car ownership adjusted to car-utilization ratios:

86.12 per cent (1948)—558,428,160 car-days
82.75 per cent (1950)—531,677,250 car-days
86.05 per cent (1952)—559,599,360 car-days

No issue is presented as to the propriety of the charge of $1.75 before April 1, 1951, when the Susquehanna refused to continue the payment of that charge. The table above shows a cost of $2.31 as of that date, and therefore indicates that the charges of $1.75 from that date to April 30, 1952, was not in excess of reasonable compensation. The same conclusion as to the $2 charge in effect for the greater part of 1952 and 1953 is supported by the showing of an average cost of at least $2.42 in those years. The present charge of $2.40, in effect since July 31, 1953, is slightly lower than the cost of approximately $2.44 shown in the table as of April 1, 1953, and we conclude therefore that a charge of $2.40 under present conditions is reasonable compensation.

The Susquehanna in its requested findings suggests that there is a "zone of reasonableness" for per diem charges sufficiently wide to include the amounts for which it seeks approval as not "unjust or unreasonably low or noncompensatory for the periods of their effectiveness, and * * * within the zone of reasonableness." By Section 1(14)(a) we are authorized "to establish * * * the compensation to be paid" as car rental. This wording does not indicate that the authority may be exercised merely by defining the upper or lower limits of a zone of reasonableness, as is usually permitted in respect of transportation rates payable by shippers.

Consequently, our finding below specifies the per diem charges which, on the basis of the facts and circumstances before us, could properly be established under section 1 (14)(a). It necessarily follows that lower charges in our judgment would not be compensatory, either at present or in the past.

We find and declare that the per diem charges of $1.75, $2, and $2.40 were not in excess of reasonable compensation during the periods in which they were effective, and that the latter charge is not in excess of reasonable compensation for present use.

An order discontinuing this proceeding will be entered.

COMMISSIONER ALLDREDGE did not participate in the disposition of this proceeding.

## APPENDIX

*Interveners in support of Complainants*—The Chesapeake and Ohio Railway Company; Chicago, Rock Island and Pacific Railroad Company; The Delaware and Hudson Railroad Corporation; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Louisville and Nashville Railroad Company; Minneapolis, St. Paul and Sault Ste. Marie Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Northern Pacific Railway Company; The Pittsburgh & Shawmut Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Texas and New Orleans Railroad Company; Western Maryland Railway Company.

*Interveners in support of Defendants*—The Ahnapee and Western Railway Company; Alexander Railroad Company; The Atlantic and Danville Railway Company; Bamberger Railroad Company; Bath and Hammondsport Railroad Company; Beaufort and Morehead Railroad Company (A. T. Leary, Lessee); Belfast and Moosehead Lake Railroad Company; Butte, Anaconda & Pacific Railway Company; Charles City Western Railway Company; Chattahoochee Valley Railway Company; Chesapeake Western Railway; Chicago, West Pullman & Southern Railroad Company; City of Prineville Railway; Craig Mountain Railway Company; Detroit and Mackinac Railway Company; Escanaba and Lake Superior Railroad Company; Flemingsburg and Northern Railroad Company; Fort Dodge, Des Moines &

Southern Railway Company; Genesee and Wyoming Railroad Company; Georgia, Ashburn, Sylvester & Camilla Railway Company; The Georgia Northern Railway Company; Hampton & Branchville Railroad Company; High Point, Thomasville & Denton Railroad Company; Howard Terminal Railway; Jerseyville and Eastern Railroad Company; Kentucky & Tennessee Railway; Lackawanna and Wyoming Valley Railroad Company (E. McLain Watters, Trustee); Lake Erie, Franklin & Clarion Railroad Company; Lakeland Railway; Live Oak, Perry & Gulf Railroad Company; Maryland and Pennsylvania Railroad Company; Minneapolis, Northfield and Southern Railway; Morehead and North Fork Railroad Company; The Narragansett Pier Railroad Company, Inc.; Nelson & Albemarle Railway Company; Norwood & St. Lawrence Railroad Company; Oregon & Northwestern Railroad Co.; Oregon Pacific and Eastern Railway Company; Paris and Mt. Pleasant Railroad Co.; Pearl River Valley Railroad Company; Rahway Valley Company (Rahway Valley Company, Lessee); Roscoe, Snyder and Pacific Railway Company; St. Marys Railroad Company; San. Francisco and Napa Valley Railroad; The San Luis Central Railroad Company; Santa Maria Valley Railroad Company; Savannah & Atlanta Railway Company; The South Georgia Railway Company; Tennessee, Alabama & Georgia Railway Company; Trona Railway Company; Ventura County Railway Company; Virginia Blue Ridge Railway; Washington and Old Dominion Railroad; Washington, Idaho & Montana Railway Company.

# APPENDIX C

## UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action

No. 56-1004-M

BOSTON & MAINE RAILROAD, ET AL

vs.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

BEFORE WOODBURY, Circuit Judge, and WYZANSKI AND McCARTHY, District Judges, by designation of Chief Judge MAGRUDER pursuant to Title 28 U.S.C. §2284.

OPINION OF THE COURT

April 28, 1958

WOODBURY, Circuit Judge. This is a controversy, in the main between the long-haul trunk line railroads and the short-haul terminal railroads, over the price a railroad ought to pay for the use on its lines of freight cars owned by another railroad.

The question of car hire is not novel. To understand its present aspects a little history will prove helpful.

In the early days of railroading in this country no railroad allowed its freight cars to leave its rails. Through freight to be transported over more than one line was un-

loaded and reloaded at junction points. With the development of more efficient transportation methods following the Civil War this wasteful and time-consuming practice of transferring cargo was gradually abandoned and for a charge the railroads began to permit their loaded cars to move off their tracks on to the tracks of connecting carriers.[1] At first the compensation to the car-owning road was fixed by the railroads on the basis of the mileage travelled by the cars of one road over the tracks of another. This basis for compensation, however, proved unsatisfactory largely for two reasons; the car-owning road had no means of verifying the mileage travelled by each of its cars over other lines and it provided no incentive to the using road for the prompt handling and early return of cars to their owners.[2]

As a solution the American Railway Association about the turn of the century, after years of study and investigation, established as the basis for compensation a flat sum per day for car use, regardless of the type or age of the car involved or the distance it travelled over the user's line. The *per diem* rate for use, known simply as the *per diem,* was gradually increased by the railroads over the years until it reached a point in the early 1950's at which the short-haul, terminating, and predominantly car-using railroads rebelled. This brings us to the present controversy and its background.

Except for one abortive attempt by the Interstate Commerce Commission, see *Palmer* v. *United States,* 75 F. Supp. 63 (1947), the *per diem* rate has always been set by the railroads themselves acting in recent years through

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[1] In 1911 car interchange was made obligatory.

[2] For a more detailed history see *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 90 *et seq.* (1931), and Stone, J., dissenting, at page 101 *et seq.*

their organization, the Association of American Railroads, known as the AAR. An agreement, known as Agreement No. 7, was drafted by the AAR setting up the procedures to be followed by it in fixing *per diem* rates and this agreement was signed by a majority of the railroads.[3] Acting according to the procedures outlined in the agreement, *per diem* rates were fixed at $1.50 as of September 1, 1947; $1.75 as of November 1, 1949; $2.00 as of May 1, 1952; and $2.40 as of August 1, 1953.

At first the railroads generally, signers and non-signers of the agreement alike, settled with one another at the rates established thereunder. In March, 1951, however, the New York, Susquehanna & Western Railroad (Susquehanna hereinafter), which was not a party to the agreement, served notice that after April 1 it would no longer pay the $1.75 rate then in effect, but offered to settle its *per diem* debit balances thereafter on a graduated scale ranging from $1.20 to $2.00 depending on the age of the cars it used. It later offered to increase its scale to a range of from $1.33 to $2.21 but its offers were not accepted and in consequence it become embroiled in a number of law suits. In June, 1953, the Boston & Maine Railroad and the New York, New Haven and Hartford Railroad Company withdrew from the agreement and gave notice of their refusal to pay the $2.40 rate and also even the earlier $2.00 rate after July 31, 1954 [*sic*—actually 1953] the Boston & Maine offering to pay on either a graduated basis or at a flat rate of $1.72 per day. Several other railroads took similar courses and the present proceeding ensued.

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[3] The Agreement provided for rights of withdrawal and independent action by the signatory railroads, and the Commission, acting under §5a(2) of the Act, approved it as in compliance with §5a(6) and therefore valid in spite of the Anti-Trust Laws. *Association of American Railroads—Agreement*, 277 I. C. C. 413. Reopened and reconsidered *Ahnapee & W. R. Co.* v. *Akron & B. R. R. Co.*, ICC Docket No. 31774, decided March 7, 1957.

It started with a complaint filed with the Interstate Commerce Commission by 19 of the larger class I railroads, against five other class I railroads, all of them short-haul roads like the Boston & Maine, the New Haven, and the Susquehanna, and six short-line roads in classes II and III, such as the Barre and Chelsea, the St. Johnsbury & Lamoille County and the New Jersey and New York Railway Company (Horace Banta, Trustee). Fifteen class I railroads intervened on behalf of the complainants and fifty-six railroads, for the most part in classes II and III, intervened on behalf of the respondents.

The complainants disclaimed any intention to invoke the specific power conferred on the Commission by §1(14)(a) of the Act which authorizes it "to establish reasonable rules, regulations and practices with respect * * * to the compensation to be paid * * * for the use of any * * * car * * * not owned by the carrier using it * * *." Instead, alleging that charges less than those fixed under Agreement No. 7 would be unjust, unreasonable and non-compensatory, and that the respondents' actions in offering to pay at other than the uniform *per diem* rate established therein, had been, were and would be disruptive of the "uniform national basis" for handling *per diem* which the Commission had deemed necessary in the public interest, the complainants asked that:

> "the Commission find and declare that the per diem rates of $1.75 and $2, during the periods in which these rates were effective, were just, reasonable, and otherwise lawful, that the current per diem rate of $2.40, effective August 1, 1953, is just, reasonable and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers; and that

the Commission grant such other and further relief as may be required in the premises."

The defendants answered, in general challenging the *per diem* rates established under the agreement as excessive and asserting that their offers of settlement were fair, just reasonable and compensatory. In addition some of them challenged the jurisdiction of the Commission to entertain the complaint. The matter came on for hearing before a trial examiner and he, upon full presentation, filed a proposed report wherein after considering the evidence and arguments in detail he concluded that "The Commission should find and declare that the *per diem* charges of $1.75 and $2.00 were reasonable during the periods in which they were effective and that a reasonable charge for present use would be $2.10." He accordingly recommended the entry of a declaratory order to that effect.

On exceptions the full Commission reached conclusions differing in part from those reached by the trial examiner. It found on its analysis of the evidence and the arguments that the *per diem* rates as fixed in the agreement were fair and reasonable. It said that "on the basis of the facts and circumstances before us" the *per diem* charges specified in the agreement were such as "could properly be established under section 1(14)(a)" of the Act and that: "It necessarily follows that lower charges in our judgment would not be compensatory, either at present or in the past." Wherefore, it said: "We find and declare that the *per diem* charges of $1.75, $2.00 and $2.40 were not in excess of reasonable compensation during the periods in which they were effective, and that the latter charge is not in excess of reasonable compensation for present use," and it entered an order discontinuing the

proceeding.[4] *Chicago, Burlington & Quincy Railroad Co.* v. *New York, Susquehanna & Western Railroad Co.*, 297 I. C. C. 291 (1955), reconsideration and rehearing etc. denied, July 16, 1956.

At the outset of our consideration of this action brought by a number of terminal short-haul railroads under Title 28 U.S.C. §1336 to enjoin, set aside and annul the above order of the Interstate Commerce Commission, we are faced with the question of its jurisdiction. The assertion is, broadly stated, that the only jurisdiction conferred by Congress on the Commission in the premises is that embodied in §1(14)(a) giving it power to "establish reasonable rules, regulations, and practices with respect to car service * * * including the compensation to be paid" by one railroad for the use of the cars of another, and that, since this jurisdiction was neither invoked nor exercised, it must follow that the Commission does not have authority to enter a declaratory order as to past or even present rates. We do not agree.

Section 5(d) of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. §1004(d) provides that within its jurisdiction any agency "is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." There can be no doubt that the railroads involved are subject to the jurisdiction of the Commission, nor can there be any doubt that a "controversy"

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[4] We have little doubt that the Commission's order is subject to judicial review under the rule of *Frozen Food Express* v. *United States*, 351 U. S. 40 (1956), for the practical impact of the order is to require the respondent carriers, and, indeed, as a practical matter all others, to pay the charges for car-use found to be reasonably compensatory at the risk of the imposition of sanctions for violating §1(11) of the Act to be considered presently.

exists between them with respect to car-hire. The question is whether the subject matter of their controversy is within the jurisdiction of the Commission. We think that it is.

Certainly the Commission could if it chose, after notice, embark under §1(14)(a) of the Act upon a full scale investigation and as a result establish by reasonable rules or regulations future practices with respect to car service, including the compensation to be paid by one railroad for the use of freight cars owned by another railroad. But it was not asked to do this and it has disclaimed any intention to do so.

Section 1(14)(a), however, is not the only section of the Act conferring regulatory powers on the Commission with respect to the use by one railroad of another's cars. Section 1(10) defines "car service" to include the "use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars and other vehicles used in the transportation of property * * * by any carrier by railroad subject to this chapter," and subsection (11) provides:

> "It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful."

In addition to the criminal sanctions imposed by §10 of the Act, §8 provides that in the event that any common carrier by railroad subject to the Act shall do, or cause or permit to be done, any act, matter or thing "prohibited or declared to be unlawful" it "shall be liable

to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation," together with a reasonable counsel fee. And §9, gives persons claiming damages under §8 the election of proceeding in a court of competent jurisdiction or else making a "complaint to the Commission as hereinafter provided." Section 13(1) of the Act provides for the filing with the Commission of complaints against carriers for violations of the Act and §16(1) provides:

> "If, after hearing on a complaint made as provided in §13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

It is true that compensation for the use of cars is not specifically included in the definition of "car service" in subsection 10, whereas §1(14)(a) in giving the Commission power to "establish reasonable rules, regulations and practices with respect to car service" goes on to state "including the compensation to be paid * * * for the use of any * * * car or other vehicle not owned by the carrier using it * * *." It is asserted that the provisions being in some respects in *pari materia* the specific inclusion of compensation for use in §1(14)(a) indicates clearly that the omission of any mention of compensation in defining car service in subsection 10 could not have been inadvertent with the result that Congress must have intended in subsection 11 to impose no duty on the railroads to establish, observe and enforce just and reasonable *per diem* charges. We do not find the argument persuasive.

Car service is broadly defined in subsection (10) to include the "use" and "interchange" of cars, and historically and also very naturally, compensation has always been incidental to and an integral part of the "interchange" of cars between railroads and the "use" of the cars of one railroad by another. Moreover, to construe compensation as outside the ambit of the meaning of "use" or "interchange" as used in subsection (10) would leave the railroads free to make whatever "unjust" or "unreasonable" rules, regulations or practices they might choose with respect to compensation for car use without running afoul of subsection (11). It is hard for us to assume that Congress could have intended any such thing. On the contrary, we think it far more likely that Congress intended to give a right of action for damages to any one suffering loss from an excessive rate of hire for the use of cars.

Our conclusion therefore is that §1(11) reasonably construed imposes a duty upon the railroads to charge no more than reasonable compensation for the use of their cars by other railroads, that §13(1) empowers the Commission to entertain complaints alleging excessive charges for car hire, and that §16 gives the Commission authority to enter orders awarding damages to those harmed by excessive car hire charges. Thus, since the Commission has jurisdiction to enter an order awarding damages for past or present unreasonable charges for car hire, it has jurisdiction under §5(d) of the Administrative Procedure Act in its discretion to enter a declaratory order with respect to the reasonableness of such charges.

We turn now to the merits.

The trunk line long-haul railroads, serving as they do the relatively sparsely settled and predominantly producing areas of the country, originate more traffic than

they terminate. The short-haul railroads serving the coastal ports and the relatively more heavily populated and predominantly manufacturing areas, on the contrary, terminate more traffic than they originate. Thus, since a railroad must provide cars enough to handle the freight originating on its lines, the freight car equipment of the country is for the most part owned by the trunk line railroads and that owned by the short-haul lines is almost a negligible proportion of the whole. See *Chicago R. I. & P. R. Co.* v. *United States*, 284 U. S. 80, 93, 95 (1931). This situation does not exist because of default by the short lines. Having more cars coming in from other lines to unload than they have cars to load and send back, they naturally, to avoid back hauling empty cars, prefer to load and return foreign cars instead of loading their own cars for dispatch off their lines. And this practice has the sanction of Car Service Rule 1, see *Car Service, Freight Cars*, 268 I. C. C. 687, which provides:

> "Home cars shall not be used for [the] movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable."

From the fact that railroads first load off-line freight on available foreign line cars, it is obvious that if a short-line predominantly freight-terminating road owns many cars it will have a surplus which must perforce remain wastefully idle on its sidings awaiting an overflow of traffic, if any. Thus the trunk lines, as owners, for the most part furnish the freight car equipment used by the short lines and the short line traffic-terminating roads are perforce *per diem* debit roads, interested in a low *per diem* rate, whereas the long-haul predominantly traffic-originating roads are *per diem* credit roads interested in a high *per diem* rate. The present controversy stems from this conflict of interest.

The short line roads contend that under Agreement 7 mentioned above the trunk lines through their voting power (under the agreement *per diem* rate increases are authorized by vote of the signatory railroads, each road casting one vote for each freight car that it owns) have raised the *per diem* rate to a more than compensatory level, and they charge the Commission with error in putting its stamp of approval on the rate increases established under the agreement.

There is not and cannot be any question that every railroad is entitled to be paid fair and just compensation for the use of its freight cars by another road. Nor can there be any question that from the car owner's point of view *per diem* is by and large and on the whole a fair enough method for calculating the compensation to which it is entitled. The question is whether *per diem*, which takes account only of the time factor and leaves out altogether the use factor, that is distance travelled on the user's line, is a fair method of determining compensation from the car user's point of view. And, if this question be answered in the affirmative and *per diem* be approved as the fairest practical method for calculating compensation from both points of view, the question then arises whether the Commission erred in its calculation of the fair *per diem* rate. We shall consider the question last stated first.

It has long been generally recognized that car hire, however established, should be enough reasonably to compensate the car owner for its costs of ownership and no more, and with this in mind that the *per diem* charge should be enough, but no more than enough, to cover the cost to the car owner of 1) repairs, 2) taxes, 3) depreciation, 4) interest on investment, and 5) miscellaneous expenses of ownership. Obviously therefore the determination of the *per diem* rate poses a complicated

question of railroad cost accounting committed by law to the Commission as a matter peculiarly within its expert competence. We therefore approach our analysis of the Commission's computations with due deference.

Detailed analysis of the Commission's computations with respect to each one of the items of car ownership expense listed above is not necessary for present purposes. We shall consider but two of them, repairs and depreciation, and the so-called "car day divisor" by which annual costs of freight car ownership are divided to reach the cost per day.

The item for repairs, the largest single component of the *per diem* charge, was calculated by the Commission largely on the basis of an account required by the Commission to be kept by all railroads known as Account 314, Freight Train Cars—Repairs. This account is of a comprehensive nature including the cost of repairs to cabooses and refrigerator cars not covered by *per diem,* and a number of other costs and expenses not directly related to the use of foreign cars. The Commission made allowances for some of these irrelevant costs included in the account but it rejected the suggestion that the account be broken down by the railroads to reflect more accurately the actual annual cost of maintaining a freight car. Such a break down of the account was recommended by the Subcommittee on Mileage and Per Diem of the AAR, which was charged with the specific, duty of fixing *per diem* under Agreement No. 7, but the General Committee of the AAR having final say on *per diem* rejected the recommendation. There was persuasive evidence that a break down of the account was practical, indeed, that some railroads at little accounting cost were already doing so for their own information. Nevertheless the Commission said:

> "The recommendation of the Subcommittee deserves further consideration. However, it is not

desirable to delay the decision of this case pending an effort to provide additional data bearing on car repairs."

Perhaps it is within the Commission's competence to reject the recommendation in the interest of expedition. But we do think it should not have done so without a more thorough investigation and more detailed findings and analysis. If the recommendation deserved consideration it should have been considered, for there was ample evidence introduced to show the value of a break down of the account in reaching an accurate computation of *per diem* and also to show that such a break down was not impractical.

Depreciation, the second largest element of the *per diem* charge, was calculated by the trial examiner on the basis of the undepreciated ledger value, that is the cost, of the freight car equipment in use which he said was "in accordance with the generally accepted accounting theory." The Commission, however, disagreed. It held that the basis should be "undepreciated reproduction value." We think that this holding is open to very serious question.

The Commission said that it realized that the prevailing accounting practice in determining depreciation was to use ledger value. But it said that it was "not here concerned with the propriety of that practice," because it was engaged in determining the just and reasonable *per diem* rates in effect at the present and during the relevant periods in the past, and in reaching that determination it would be less than realistic if it failed to take into consideration "that carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values."

If depreciation is an element, and not a minor one, of the *per diem* charge, we fail to see why accepted account-

ing practices for determining depreciation should be tossed aside as irrelevant. Moreover, as the trial examiner pointed out, ledger value is a known figure whereas the cost of reproduction can at best only be estimated and the process is inherently difficult because it involves many assumptions which are at least open to question. Furthermore, there is persuasive evidence that with ever faster freight trains and ever more efficient use of cars, present freight car requirements are met with fewer cars than were formerly needed with the result that in all probability many cars now in use will never actually be replaced so that on the Commission's basis car users in paying *per diem* will in part be compensating car owners for expenses they will never incur.

We turn now to the "car day divisor" by which the Commission determined the average cost per day of car ownership.

It appears to be generally agreed that surplus or unserviceable cars should not be included in computing the average daily cost of owning a freight car. The question therefore is to determine the average number of days per year that freight cars are in active use, that is to say, either in active use on the line of the owner, or else on a foreign line, whether in active use thereon, or laid up for repairs, or standing idle. Since no car is in active use all the time an adjustment is necessary to spread the actual annual cost of ownership over the shorter period when the car is in active use. This is accomplished by means of a car-utilization ratio which is, simply, the ratio which the average number of days a freight car is in active use bears to 365, the number of days in the year.

Since all the freight cars in the fleet are not in active use all the time, the utilization ratio is always less than 100 per cent. The effect of the ratio, therefore, is to in-

crease the *per diem* charge over what it would be if all cars were in use all the time and consequently the lower the ratio the higher the *per diem* charge. That is, a ratio of say 75% would lead to a higher *per diem* charge than a ratio of say 90%.

The Commission, to determine the appropriate car utilization ratio for calculating *per diem,* averaged actual car utilization over the past twenty years. This period included several of the depression years of the 1930's when many freight cars lay idle for want of traffic and consequently use of the twenty-year period produced a lower ratio, and a higher *per diem,* then would have been the case had a shorter period been used.

The plaintiffs argue strenuously and persuasively for the use of a shorter period than twenty years in computing average freight car utilization. We would find it difficult, however, in view of the nature of the question and the Commission's expertness in the field, to say that the Commission committed error of law in using the twenty-year period. But the Commission reached its conclusion in part upon an earlier decision, *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.,* 274 I.C.C. 383 (1949), from which it quoted, wherein it had said at page 389: "The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10 or 15 years." We think the Commission erred insofar as it considered car-age a factor in computing car-utilization. We agree with the statement of the trial examiner who said in this connection:

> "The mere fact that freight cars have an average life of about 20 years affords little or no ground for assuming that their probable utilization in any given future year will be the same as that for the average

of the past 20 years. There is no reason to believe that economic cycles are so marked."

The foregoing discussion is more by way of warning to the Commission for its future guidance than a statement of the grounds for our decision annulling and setting aside the order of the Commission. Basically and fundamentally we ground the result which we reach upon the inadequacy of the Commission's consideration of the first question stated earlier in this opinion.

*Per diem,* as Mr. Justice Stone pointed out in his dissent in *Chicago R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 112 (1931), "is admittedly but a rule of thumb." We are not fully persuaded, however, as Mr. Justice Stone suggested, that it is nonetheless "the best which experience has devised to meet all the complex requirements growing out of the average car-hire situation." The *per diem* method may work out well enough on the average over a period of years to provide the railroads as car owners with fair compensation for the use of their cars. But there is another side of the coin, and that is the fairness of the method to the railroads as car users.

The short-haul, terminating and predominantly freight car-using railroads, by the very nature of their operation, move freight cars relatively short distances over their lines. And, as the Commission pointed out, "The average detention per car in their terminals is high." Thus on these roads, because of their short-haul terminating nature, the average freight car is subjected to relatively little mileage, and, on the other hand, is necessarily detained for unloading, and if traffic permits reloading, for a relatively long period of time in relation to its total mileage movement. On the basis of these considerations, supplemented by evidence that a study conducted in 1948 by the Engineering Section of the Commission's Bureau

of Valuation disclosed that 70% of the cost of freight car repairs and 45% of the cost of freight car depreciation are directly attributable to the mileage to which a car is subjected as distinguished from the passage of time alone, the plaintiffs strenuously argue for a method of calculating car-hire which will include a mileage factor in addition to a time factor. They do not suggest going back to the early method of calculating car hire solely on the basis of the mileage travelled by each foreign car on a user's line. Nor do they suggest any sort of pure mileage basis for calculating car-hire, such, for instance, as a rate calculated only on the average mileage travelled by freight cars on a user's line.

Their suggestion is that a fixed mileage factor be determined for each road based upon the average distance in miles which freight cars move per day on its lines, which it is said can easily be determined from statistics kept by the railroads and will need to be revised only when there is a substantial change in a railroad's freight traffic pattern, and that this use factor be used in conjunction with a uniform time factor for all railroads to produce a rate of car-hire to all railroads, both short and long-haul.

Basically this time-mileage plan involves a separation of the national aggregate car ownership cost into two categories, one consisting of that proporation of the aggregate cost directly attributable to mileage use and the other consisting of the remainder which is treated as attributable to the passage of time. Thus under the plan the *per diem* car-hire charge for a particular road is a composite figure consisting of the sum of that particular road's mileage component and the uniform national average unit cost per day attributable to time alone. It is said that the function, and the virtue, of this plan is to reallocate the aggregate ownership costs among the using

railroads directly in proportion to the actual use, *i.e.* the wear and tear, incurred by cars used on each road.

The Commission gave the plan only cursory consideration. After stating its general features it said that the determination of a separate mileage use rate could not be made from the evidence before it in the case, and moreover that "it [such determination] would involve a long and complicated statistical undertaking."[5] It then added: "If by that means a scheme of equitable separate charges for individual user roads could be devised, there would be an increase in the labor now required for settling *per diem* accounts." Following this it briefly discussed a plan proposed by the Boston & Maine Railroad for determining a *per diem* rate based on the average age of the freight car fleet of the car-owning road, a plan no longer advocated which we need not consider, and then it said, referring to both plans:

> "As above indicated, the suggested plans for varying *per diem* charges could not be put into effect without an extensive investigation either by this Commission or by the AAR. The facts and arguments here presented are not persuasive that plans of this kind are desirable."

We do not say, for it is not our function to say, that the time-mileage plan proposed is fair and practical and ought to be adopted. What we do say is that the plan deserves more than the cursory consideration given to it by the Commission, for without more detailed findings by it we cannot exercise our judicial function.

It is true that straight *per diem* has been the basis of settlement for freight car use for over fifty years. But

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[5] There is little or no specific support for this general statement in the record considered as a whole.

that does not render the straight per diem method sacrosanct. The suggested time-mileage plan on its face seems to have much to recommend it for it combines use with the passage of time as the basis for figuring a rate for car hire, and this certainly seems fairer to the short-haul terminating lines. If the evidence in this case is not sufficient to permit determination of an actual mileage use rate, the Commission can take further evidence or turn the matter over to its accounting staff for investigation and analysis. In advance of a more thorough study we do not see the basis for the Commission's broad conclusion that the plan is both impractical and undesirable. To perform our function in the face of the persuasive evidence that the plan is both desirable and feasible we must have at least some inkling of the basis for the Commission's general conclusions to the contrary. In short we think the Commission erred in brushing aside a matter of such importance to so many vital links in our transportation system with little more than a casual wave of the hand.

We are not impressed with the argument advanced by some of the plaintiffs that the Commission should have dismissed the complaint for a declaratory judgment filed with it by the trunk line roads on the ground that in bringing it the complainants were acting in furtherance of a conspiracy unlawful under the Sherman Anti-Trust Act. Indeed, we are so little impressed with the argument that we see no need either to specifically refute it or even to state it in detail.

*A decree will be prepared setting aside and annulling the order of the Interstate Commerce Commission.*

*Dissenting Opinion of McCarthy, D. J.*

McCarthy, D. J. (Dissenting)

This action stems from a basic dispute between the short-line, freight terminating railroads and the car-owning freight originating railroads as to the per diem charges for each freight car while it is on the tracks of any railroad but the owner. The problem before the three judge court concerns the question of the power of the Interstate Commerce Commission to enter the order in ICC Docket No. 31358, and which is presented for review by this court together with the further question of whether or not the order entered was supported by evidence adduced before the Commission.

It is my conclusion that the Commission was without jurisdiction to enter the order in question; hence, this separate opinion in addition to the learned discussion written by Judge Woodbury.

As has been stated by Judge Woodbury the Interstate Commerce Commission entered an order which in itself clearly indicated that it was not acting under Section 1 (14) (a) of the Interstate Commerce Act. He proceeds, however, and determines that the Commission derives authority elsewhere to enter a declaratory order as to rates. With this determination I cannot agree.

Section 5 (d) of the Administrative Procedure Act authorizes declaratory orders of the sort entered here by the Commission, but this section does not confer jurisdiction. Jurisdiction to enter this order must arise elsewhere. Section 9, Administrative Procedure Act; *Olesen* v. *Standard*, 227 F. 2d 785. Out of deference to the rights of the parties it is the duty of the court to search the Interstate Commerce Act to determine if jurisdiction to enter an order establishing compensation for so-called

per diem charges is granted under the Act separate and apart from Section 1 (14) (a).

Section 1 (4) of the Interstate Commerce Act grants compensation setting power, but this section is limited to through route cases and it is apparent from an examination of the record that the case currently before the three judge court invoves more than "through route" usage and compensation.

Section 1(11) grants rule making power, but it does not refer to compensation as such. This section is analogous to Section 1 (12) which has been interpreted by the Supreme Court in *Chicago, Rock Island and Pacific Railway Co.* v. *United States,* 284 U. S. 80, as not including compensation. The language used in that case at page 99 is conclusive of the entire situation: "That subject [compensation for use of cars], as already appears, is covered by Section 1(14)(a)." This language also negatively answers the suggestion that power to set compensation is impliedly in Section 1(10) or 1(11). Cf. also *Palmer* v. *United States,* 75 Fed. Supp. 63.

It is my considered judgment that, if the Commission has the power to enter an order such as this, without compliance with the requirements of Section 1(14)(a) the will of Congress has been thwarted. The obvious result of this order of the Commission is to grant to the credit balance roads unlimited power to boost per diem rates. Because of the organization of the Association of American Railroads and the voting procedures used in setting per diem rates, the debit balance railroads, under the order entered by the Commission, are the captives of the credit-balance roads and, because of the "car service" rules and the economic facts of railroad life, they cannot buy enough

freight cars to obtain enough votes to control per diem rate setting within the General Committee of the Association of American Railroads.

It may also be noted that the eastern railroads described in this petition have approximately 16,000 freight cars and these roads are all debit car railroads while the large shipping credit car railroads have cars which run into the hundreds of thousands. This becomes important in view of the fact that there is an obligation devolving upon the debit car railroads to use cars owned by the credit car railroads for shipping purposes before they can utilize their own. This is only one viewpoint of the many angles that were thoroughly disregarded by the Interstate Commerce Commission when they disregarded the recommendations of the examiner and accepted "in toto" the rates set by the American Association of Railroads.

Section 1(14) (a) is intended to negative the possibility of the issuance of any order such as we have here—an order which is, in truth, merely a rubber stamp of a decision already made by the stronger of two economic groups. Here, we have an instance of an abandonment of its functions by the Commission altogether in favor of the long-haul trunk line railroads. The Commission in the exercise of its duties has taken the simple way out. Substance has given way to mere form.

Decision that jurisdiction may be found only within the confines of Section 1(14)(a) would obviate the possibility of the Commission surrendering its powers and duties by seeking the easy way.

Congress has spoken only twice as to per diem rates. The first was in Section 1(14)(a) which carries with it the requirement that the Commission conduct an investigation

through its impartial experts. The second was in the Bulwinkle Act which authorized the organization of a private association with the approval of the Commission and which accepted rates set by this private association from the sway of the Sherman Anti-Trust law, but only so long as non-assenters were free to refuse to follow the rates set by the association and to bargain independently. The order before the Court does not set rates in accord with Section 1(14)(a) and the order before the Court does not come within the purview of the Bulwinkle Act, since the effect of the order is to require compliance with the established rates by all railroads, assenters and non-assenters alike.

It should be noted that the Congress has provided for adequate safeguards in each situation. Under Section 1(14)(a) rates may be set only after an impartial investigation conducted by a corps of experts available at all times in the personnel of the Interstate Commerce Commission; under the Bulwinkle Act the non-assenters are free to bargain independently. If the order of the Commission here should be rubber-stamped these safeguards would be lost and the clearest of anti-trust violations by illegal price fixing would be endorsed.

That part of the declaratory order here under review which states that the per diem charges were charges which could have been established under Section 1(14)(a) and that lower charges would not be compensatory is not an escape hatch which this Court can use for the following reasons.

1. The fact that the charges could have been established under Section 1(14)(a) is not enough for the Commission to endorse them. Under that section the Commission could not establish rates retroactively.

2. The fact that the Commission finds that lower rates would not be compensatory is not enough because this finding, if it is such, is not based on the impartial investigation which would have been held had the Commission acted under the said section.

I would therefore vacate the order of the Interstate Commerce Commission because it is without jurisdiction. To arrive at any other conclusion is tantamount to saying that the Commission can close one legislative gap after another. The history of the Act leads only to one conclusion and that is that these gaps cannot be closed except by the Congress of the United States.

# UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 56-1004

BOSTON & MAINE RAILROAD, *et al.*

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION

## JUDGMENT

This cause having come on to be heard on the plaintiffs' complaint seeking to enjoin, set aside, and annul a report and order issued by the Interstate Commerce Commission, dated October 17, 1955, (petition for reconsideration, re-argument and further hearing denied July 16, 1956) in a proceeding known as *Chicago, Burlington & Quincy Railroad Company, et al* v. *New York, Susquehanna & Western Railroad Company, et al.*, I. C. C. Docket No. 31358, and the United States of America and the Interstate Commerce Commission having filed answers, and other parties having intervened, and all parties and intervenors being agreed (and the Court having found) that there is no genuine issue as to any material fact, and the Court having heard counsel, and the Court having concluded in an opinion by Judge Woodbury that plaintiffs are entitled to judgment as a matter of law.

*Judgment*

It is hereby ORDERED, ADJUDGED AND DECREED:

That the order issued by the Interstate Commerce Commission, dated October 17, 1955, is set aside and vacated and the cause is remanded to the Commission for further proceedings not inconsistent with the aforesaid opinion of Judge Woodbury.

That the plaintiffs shall recover their costs of $ in this Court.

Issued at Boston, Massachusetts, this 5th day of May, 1958.

s/ PETER WOODBURY
Judge of the United States Court of Appeals

s/ CHARLES E. WYZANSKI, JR.
Judge of the United States District Court

Judge of the United States District Court

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JUL 15 1969
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

**October Term, 1969**

No. 343

BOSTON AND MAINE RAILROAD, *et al.*,
*Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,
*Appellees,*

*and*

BOSTON AND MAINE CORPORATION,
*Appellant,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

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## APPENDICES D, E, F, G AND H TO JURISDICTIONAL STATEMENT

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BOSTON AND MAINE CORPORATION
RICHARD JOYCE SMITH, *Trustee of The New York, New Haven & Hartford Railroad Company*
THE LONG ISLAND RAILROAD COMPANY
CERTAIN CLASS II, TERMINAL AND SWITCHING RAILROADS

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J. PETER COLL, JR., ESQ.

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# APPENDIX D

## INTERSTATE COMMERCE COMMISSION

Served December 23, 1965

No. 31358 [1]

CHICAGO, BURLINGTON & QUINCY R. R. CO., ET AL

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL

Decided

In Docket No. 31358, per diem charges of $2.40, $2.75, and $2.88 for the use of railroad-owned freight cars when on the lines of rail carriers other than their owners, found in excess of reasonable compensation. Multi-level per diem charges found not in excess of reasonable compensation in certain instances, and in excess of reasonable compensation in others. Reasonable compensation found and proceeding discontinued.

In Docket Nos. 33145 and 34405, multi-level system of rate calculation for per diem charges found unreasonable. Methods prescribed for the calculation of per diem

[1] This report embraces also Docket No. 33145, *Railroad Freight Car Per Diem Charges* and Docket No. 34405, *Southern Railway Company et al* v. *The Pennsylvania Railroad Company, et al.*

charges on a multi-level basis adequate to reasonably compensate owners of freight cars and to provide for fair, reasonable, and non-discriminatory assessment of charges upon railroads using such cars. Appropriate orders entered.

*Andrew C. Armstrong, John C. Ashton, Richard R. Bongartz, S. R. Brittingham, Jr., Robert J. Cooney, John A. Daily, Kemper A. Dobbins, Robert H. Duesenberg, J. H. Durkin, Donald M. Dunn, Kenneth H. Ekin, A. Paul Funkhouser, James A. Gillen, John Guandolo, Alfred W. Hesse, Jr., Howard D. Koontz, A. W. Laisy, R. D. Lalanne, Joseph L. Lenihan, Charles M. Little, David G. Macdonald, G. M. Mariner, John F. McCartney, John E. McCullough, R. K. Merrill, Martin A. Meyer, Jr., P. C. Mullen, W. H. Parsons, Charles D. Peet, Duncan B. Phillips, Ernest Porter, Leo H. Pou, Howard E. Roos, Albert B. Russ, Jr., John J. Schmidt, Andrew C. Scott, John S. Shannon, T. J. Slattery, Elmer B. Trousdale, Donald L. Turkal, Harold B. Vikoren, Robert J. Williams, Claude R. Wilson, Jr., Robert W. Yost,* and *Erle J. Zoll, Jr.*, appeared for complainants in No. 31358 on rehearing and reconsideration.

*Reginald Ames, Hewitt Biaett, S. R. Brittingham, Jr., Benson T. Buck, J. T. Clark, John H. Colgren, Clifford T. Coomes, Richard E. Costello, John C. Danielson, Kemper A. Dobbins, Gerald E. Dwyer, John W. Hanifin, L. W. Hobbs, Thormund A. Miller, C. Harold Peterson, Roland Posey, W. C. Purnell, Edward M. Reidy, John F. Reilly, E. L. Ryan, Jr., Jerome H. Shapiro, Matthew V. Stepsis,* and *Herbert A. Waterman* appeared for interveners in support of complainants in No. 31358 on rehearing and reconsideration.

*Andrew J. Azzara, Richard Swan Buell, Andrew M. Calamari, James I. Collier, Jr., William T. Griffin, Joseph P. Hawryluk, William J. Hickey, Neal Holland, J. N. Hood, Theodore S. Hope, Jr., George M. Onken, Carl E. Newton,*

*Peter Benton Spruance, Richard H. Stokes, William Tatlock, M. Lauck Walton,* and *Granville Whittlesey, Jr.,* appeared for defendants in No. 31358 on rehearing and reconsideration.

*William J. Hickey* and *J. N. Hood* appeared for interveners in support of defendants in No. 31358 on rehearing and reconsideration.

All of the above-named counsel and, in addition, the following: *Martin J. Keating, Gordon E. Neuenschwander, Eldon S. Olson, Richard H. Strodel, Donald L. Turkal,* and *L. F. Van Kleeck* for respondents in No. 33145.

*John Guandolo, David G. Macdonald* and *Duncan B. Phillips* for complainants in No. 34405.

*Reginald Ames, Andrew J. Azzara, Richard R. Bongartz, S. R. Brittingham, Jr., Benson T. Buck, Richard Swan Buell, John H. Colgren, James I. Collier, Jr., Clifford T. Coomes, J. Crossan Cooper, Jr., James A. Gillen, William T. Griffin, John W. Hanifin, Theodore S. Hope, Jr., James W. Hoeland, Howard D. Koontz, A. W. Laisy, Richard D. Lalanne, R. K. Merrill, Thormund A. Miller, Carl E. Newton, George M. Onken, Eldon S. Olson, W. H. Parsons, C. Harold Peterson, Roland Posey, John F. Reilly, Howard E. Roos, Albert B. Russ, Jr., M. D. Sampels, John J. Schmidt, John S. Shannon, Richard H. Stokes, William Tatlock, William A. Thie, Elmer B. Trousdale, Donald L. Turkal, E. L. Van Dellen, Harold B. Vikoren, M. Lauck Walton, Edward K. Wheeler, Granville Whittlesey, Jr.,* and *Robert W. Yost* for defendants in No. 34405.

*Lyman C. Bybee* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

# REPORT AND ORDER

RECOMMENDED BY R. C. BAMFORD, HEARING EXAMINER

These proceedings concern charges[2] made by railroads for the use of their freight cars by other railroads. Docket No. 33145 is an investigation instituted by the Commission on July 24, 1959, pursuant to the provisions of Section 1(14)(a) of the Interstate Commerce Act, for the purpose of establishing reasonable rules, regulations, and practices with respect to the compensation to be paid for the use of freight cars which are not owned by the using carrier. It was assigned to be heard on a consolidated record with the proceedings in Docket 31358, which case was reopened for further hearings by order of March 24, 1959. During the course of the hearings, a complaint proceeding, Docket No. 34405, was filed by Southern Railway Company, et al, which involved issues similar to those presented in Docket No. 33145. By order of March 10, 1964, this case was assigned for hearing together with Docket 31358 and 33145, then in progress.

The first of these three proceedings, in point of time, is Docket 31358, which was commenced by a complaint filed September 21, 1953, by 19 of the larger Class I railroads against nine eastern railroads. The complainants sought a finding and declaration by the Commission that each of the rates of $1.75, $2.00, and $2.40 per car per day were just, reasonable, and otherwise lawful during the periods they were effective, and that the performance of orderly transportation service by rail in the public interest required uniform observance of such rates by the defendants together with other carriers. Fifteen class I railroads intervened in behalf of complainants, and 56 railroads,[3]

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[2] Referred to as "per diem" or "car rental" charges. See Appendix A for definitions of various terms.

[3] Listed in *Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co.*, 297 I. C. C. 291.

principally classes II and III, intervened in behalf of the defendants. The Commission, on October 17, 1955, found and declared that the per diem charges of $1.75, $2.00, and $2.40 were not in excess of reasonable compensation during the periods they were effective, and that the $2.40 charge was not in excess of reasonable compensation for the then present use, and ordered the proceeding discontinued.[4] *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I. C. C. 291 (1955).

On review by a three-judge Federal District Court in Massachusetts it was held, one judge dissenting, that the Commission had jurisdiction under sections 1(11), 13(1), and 16 of the Act and section 5(d) of the Administrative Procedure Act (5 U. S. C. A. 1004(d)) to enter a declaratory order with respect to the reasonableness of past car-hire charges. *Boston & Maine Railroad et al* v. *United States*, 162 F. Supp. 289 (1958). The Court further (1) indicated that the Commission should not have rejected without a more thorough investigation and more detailed findings and analysis, a suggestion that the railroad accounts pertaining to car-hire costs be broken down to reflect more accurately the actual annual cost of maintaining a freight car; (2) questioned whether depreciation should be based on undepreciated ledger value or on undepreciated reproduction value used by the Commission; (3) disapproved the Commission's use of average car age in establishing the car-day divisor, and (4) condemned its failure to give adequate consideration to mileage as an element in arriving at charges for car-hire. Because of the failure to consider mileage, the Court vacated the order of the Commission discontinuing the proceeding and remanded the case for further proceedings not inconsistent with the majority opinion of the Court.

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[4] Reversing, in part, the finding of the Hearing Examiner that the rate of $2.40 was in excess of reasonable compensation to the extent that it exceeded $2.10.

On appeal to the Supreme Court, the Commission sought and was granted remand of the proceeding to it for consideration and disposition in accordance with the terms of the three-judge court's decision and order. *Boston & Maine R. Co.* v. *United States*, 358 U. S. 68. Accordingly, upon petition of the complainants and supporting interveners, the Commission on March 24, 1959, reopened the proceedings for further hearing.

On July 24, 1959, the Commission, by order in Docket No. 33145, initiated prescriptive action under section 20 of the Act requiring detailed reports from the respondent railroads to facilitate more accurate computation of freight car per diem charges, and ordered an investigation pursuant to section 1(14)(a) looking to the establishment of reasonable rules, regulations, and practices with respect to determining the compensation to be paid for the use of carrier-owned freight cars not owned by the using carrier. All rail carriers subject to part I of the Act were made respondents. At the same time, the proceedings in Nos. 31358 and 33145 were assigned for hearing on a consolidated record.

Prior to June 10, 1953, most of the defendants in Docket No. 31358 were parties to an agreement which provided the organization and method by which the daily rate was to be established. This agreement had been approved by the Commission pursuant to Sec. 5(a) of the Act, and became effective on October 7, 1950.[5] On June 10, 1953, these

[5] *Association of American Railroads—Agreement*, 277 I. C. C. 413; *Ahnapee & W. Ry. Co.* v. *Akron & B. B. R. Co.*, 300 I. C. C. 73, 302 I. C. C. 265. This agreement provides for use of the services of the General Committee of the Operating-Transportation Division of the Association of American Railroads, and the Board of Directors of that organization, to make studies and recommend establishment and changes in rates, charges, rules and regulations governing per diem, mileage, demurrage and storage. Rates sub-

(footnote continued on next page)

defendants withdrew from the agreement insofar as it concerned per diem rates and, following the increase to $2.40 on August 1, 1953, notified other lines that they would not pay the increased amount.[6] Thereafter they continued to receive and deliver cars of other lines but paid car rental at a lesser rate, generally in the vicinity of $2 per day. They have continued this practice with respect to the rates as subsequently increased.

Following the institution of proceedings in Docket 31358 there were filed, and are now pending in the United States District Court, Southern District of New York, 109 complaints, consolidated by the Court for all purposes wherein numerous rail plaintiffs seek to recover from the New York, New Haven and Hartford and the Boston & Maine, for the use by the defendants of plaintiffs' cars at a rate of $2.40 per day from August 1, 1953, through December 31, 1956, of $2.75 from the latter date to December 1,

(footnote continued from previous page)

mitted to the members of the agreement by the AAR Board of Directors are effective only upon majority vote of the members but the close identity between the membership of the agreement and that of the Association, together with the use of the Association's facilities and committees to administer the provisions of the agreement have resulted in the rates being generally referred to as AAR rates. For convenience, they will be so designated in this report without suggesting, however, that the legal distinction between the two organizations is not valid. A description of the procedures involved in calculating and effectuating per diem rates appears in *Ahnapee & W. Ry. Co.* v. *Akron & B. B. R. Co.*, 300 I. C. C. 73.

[6] The first railroad to refuse payment was the New York Susquehanna & Western Railroad Company which was not a party to the agreement. Its refusal took place on March 16, 1951, and is the only one which involved payments under the $1.75 and $2.00 rates. It appears that subsequent to the institution of proceedings in Docket 31358 this defendant changed management, paid arrears at the rates assessed and has since paid the assessed rates. No issue thus remains with repect to the rates preceding the $2.40 rate.

1959, and since then of $2.88,[7] less interim payments of about $2.00 per day made under temporary settlements. The defendants answered contending, among other things, that the claimed rates were unreasonably high and counterclaimed for the difference between the amounts actually paid and any lesser amounts which might be found reasonable. *Baltimore & O. R. Co.* v. *New York, N. H. & H. R. Co.*, 196 F. Supp. 724, 726-727 (1961). On June 15, 1962, the Court disposed of several motions and directed immediate entry of partial summary judgment for plaintiffs. The judgment in favor of 21 of the plaintiffs extended only to a declaration and adjudication that they are entitled to recover per diem in such amounts as are found by the Court to be due them—

> "* * * based upon a rate to be found just, fair, reasonable and non-discriminatory by the Interstate Commerce Commission, of which said Commission shall advise this Court and thereafter to be ultimately determined and fixed by this Court for each month beginning with August, 1953 to date to be computed with interest."

The order provided for grant of partial judgment for the remaining plaintiffs. Entry of final money judgment was stayed pending the determination by the Commission of the per diem controversy in No. 31358 or until further order of the Court. The plaintiffs were directed, with their consent, to amend their complaint in this proceeding so as to request the Commission—

> "* * * without regard to the proceeding pending in Docket No. 33145, to advise this Court what *per diem* rate was just, fair, reasonable and non-discriminatory for each month beginning with Au-

[7] Whether the complaints have been amended to include charges accruing thereafter, or to include charges based upon the multi-level rates, effective January 1, 1964, is not of record.

gust 1953, to date, for the purpose of the suits consolidated herein; * * *"

Accordingly, the plaintiffs (complainants in 31358) sought and were granted leave to so amend their complaint. Interveners and petitioners for intervention also sought appropriate leave to intervene in support of the complaint so to be amended. By order entered by the entire Commission on December 19, 1962, leave was granted.

The Illinois Central Railroad Company, one of the complainants in No. 31358, is a defendant in two suits pending before the Supreme Court of the State of New York, County of New York, captioned, in part, in one case, *Boston and Maine Railroad* v. *Illinois Central Railroad*, Index No. 115 59, and, in the other, *New York, New Haven, and Hartford Railroad Company* v. *Illinois Central Railroad*, Index No. 70 63. In each case, the plaintiff sued the Illinois Central for interline freight balances and it counterclaimed for per diem balances. In dismissing the Boston and Maine's motion to dismiss the counterclaim against it and for summary judgment, the Court deferred ruling on the counterclaim to await advice from this Commission as to what per diem rates it would find lawful. Accordingly, the complainants in No. 31358 filed an amendment of the complaint praying that the Commission, without regard to the proceeding in No. 33145, advise not only the United States District Court for the Southern District of New York, but also the aforementioned Supreme Court of the State of New York in the cases there pending, what per diem rate was just, fair, reasonable, and nondiscriminatory for each month beginning with August, 1953, to date, and in so advising the court, find and declare that a rate no less than each of the rates in issue in No. 31358 was, during the period each was in force, just, fair, reasonable, and nondiscriminatory.

On March 2, 1964, Southern Railway Company and its affiliates filed a complaint with this Commission (Docket No. 34059), pursuant to section 1(14)(a) of the Act, against the Pennsylvania Railroad and numerous other railroads, as defendants, challenging the validity of the multi-level per diem rates which had replaced the $2.88 rate, effective January 1, 1964, and praying the Commission to fix for the future, reasonable rules, regulations, and practices respecting freight car per diem service including the compensation to be paid and the basis therefor. Consolidation of the proceeding for hearing with those in Nos. 31358 and 33145 was requested and granted.

On March 6, 1964, the Commission granted complainants in No. 31358 leave to further amend their complaint so as to bring in issue the multi-level rates which had become effective on January 1, 1964.

Briefly stated, the issues presented to the Commission by the above-described proceedings are whether the rates charged at various times over the past decade and a half by car owning railroads for the use of their cars by other railroads were just, reasonable and compensatory as provided in Sections 1(10), 1(11) and 1(14)(a) of the Act, and if not, what rates would meet the standard for each period; and, what rate, rates, or method of establishing rates, will insure the satisfaction of that standard in the future.[2]

## Preliminary Discussion

During the early development of the railway networks which now cover the United States, it was customary for the individual lines to acquire freight cars necessary for their own operations, and to return them to their own

[2] For convenience, the parties to these proceedings are referred to herein as respondents, except where the context requires more specific identification.

service. Where freight originating on one line moved to a destination on another, the lading was physically transferred from the car of the originating line to the car of the connecting line. As the railroads grew, this method of handling service proved uneconomical and it eventually became the general practice for the originating carrier to deliver its car to the connecting line for onward movement without disturbing the lading.[2] With the enactment of the Interstate Commerce Act, the then established custom of interchanging cars became obligatory on carriers where through routes were established. See *Missouri & Illinois Coal Co. v. I. C. R. R. Co.*, 22 I. C. C. 39, 44-45; *Chicago, R. I. & P. Ry. Co. v. U. S.*, 284 U.S. 80, 91, 101-102; *U. S. v. Pennsylvania R. Co.*, 323 U.S. 612, 615. While contributing to transportation efficiency, however, this method of operation created certain problems with which the industry has wrestled ever since. The originating line is deprived of the use of its car until its return, while the connecting lines are enabled to perform their portion of the transportation service without employing one of their own cars.

The right of the car owner to compensation when its car is used by another line has frequently been recognized. See *Virginia Blue Ridge Ry. v. Southern R. Co.*, 96 I. C. C. 591, 593-594. "It is a fundamental principle that a car owner is entitled to adequate compensation for the use of his car by another carrier." *Morehead & North Fork R. R. Co. v. Chesapeake & O. Ry. Co.*, 100 I. C. C. 45, 48; *Jefferson & Northwestern Ry. Co. v. Missouri, K. & T. Ry. Co.*, 102 I. C. C. 72, 75. Ascertainment of the amount of compensation and the manner in which it is to be assessed, however, has been subject to considerable experimentation and difference of opinion. In the late 1860's

[2] Cars involved in this interchange service, and with which the charges here in issue are concerned, are customarily referred to as "per diem" cars.

the rates were generally one cent per mile on cars of special construction, and ¾ cent per mile on ordinary cars. They were established by various agreements between railroads, as no national association then existed. In the early 1870's a railroad in New England experimented with a combination mileage and demurrage plan, and two central-western carriers employed a rate of 50 cents per day between themselves. In 1888 a combination of mileage and per diem payment was attempted but abandoned after a few months due, among other factors, to the increased accounting costs. The straight mileage system was finally abandoned in 1902 and on July 1 of that year the flat daily rate system of charging became effective. See *Rules for Car-Hire Settlement*, 160 I. C. C. 369, 374-375; *Chicago, R. I. & P. Ry. Co.* v. *U. S.*, 284 US 80, 101-103. This method prevailed until January 1, 1964, when it was modified by providing a scale of daily rates varying with the value of the car.[9] By 1920 the daily rate had risen to $1 per day, and by September 1, 1947, to $1.50 per day. Subsequent increases were as follows:

| | |
|---|---|
| Effective Nov. 1, 1949 | $1.75 |
| May 1, 1952 | 2.00 |
| Aug. 1, 1953 | 2.40 |
| Jan. 1, 1957 | 2.75 |
| Dec. 1, 1959 | 2.88 |
| Jan. 1, 1964 | Multi-level rates. |

In Docket 31358 findings are sought in order to assist in resolving specific disputes as to the amount of damages, if any, to which the complainants may be entitled. The

[9] The daily rate was originally entitled a "per diem" when promulgated in 1902. Certain parties prefer the term "car rental". Both terms are used herein to mean the compensation to be paid, on whatever basis computed.

Commission's findings in this case as to the reasonableness of the rates charged in the past can have effect only as an aid to the settling of the dispute between the parties, and to the Courts as an aid in settling the amount of damages they may award. Dockets 33145 and 34405, which invoke the Commission's authority under Section 1(14)(a) of the Act, require the issuance of an order for the future. The principles which govern the Commission's findings should not differ, however, as between the past, present or future rates, other than made necessary by limitations on the information available for their application.

Section 1(10) of the Interstate Commerce Act defines "car service" as including, inter alia, the use, control, supply, movement, distribution, exchange, interchange, and return of cars by any carrier by railroad subject to Part I. Section 1(11) makes it the duty of every such carrier by railroad to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service. Unjust and unreasonable rules, regulations, and practices with respect to car service are prohibited and declared unlawful. Section 1(14)(a) authorizes the Commission, after hearing, to establish reasonable rules, regulations, and practices with respect to car service, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any car not owned by the carrier using it. The term "compensation" is commonly understood as having the meaning of making whole, an equivalent, indemnification, maintaining an equilibrium, or providing a quid pro quo for a service rendered. As used here it does not connote any element of profit to the owner, nor may it be measured by the benefit to the user. The charge should be equivalent to the car-ownership costs which the user would have to bear if it owned the car. See: *Virginia Blue Ridge Ry.* v. *Southern Ry. Co.*, 96 I. C. C. 591, 593-594; *Marcellus &*

*Otisco Co. v. New York Central R. Co.*, 104, 389, 392; *Rules for Car-Hire Settlement*, 160 I. C. C. 369, 378; *Palmer* v. *United States*, 75 F. Supp. 63; Black's Law Dictionary, 4th Ed., 1951; Funk & Wagnalls New Standard Dictionary, 1946; Webster's Third New International Dictionary, 1961.

It is apparent that if there were but two railroads, and each used the other's cars to the same degree, the payments would balance out and it would matter little whether they were established at $1 or $100 per day. For those railroads today whose payments balance out receipts within reasonable limits, the problem is quite similar. The actual situation however is far more complex for many carriers. In 1960 there were over 100 Class I line-haul railroads, over 300 Class II line-haul railroads, and about 200 Class I & II Switching & Terminal Companies and electric railways involved in these payments. At any given time a carrier may be a net creditor as to one line, and a net debtor as to others. A line which is, in total amount, a net creditor line on an annual basis, may be in a net debtor position with respect to particular lines, and all these relationships can vary from month to month throughout the year.

Railroads having a high ratio of originations of shipments to terminations generally occupy a net per diem creditor status, since they earn more on cars sent off line than they pay on cars received. They suffer from particular problems, not the least of which is the loss of use of cars sent out in interchange service, and the necessity of using, in their place, interchange cars of other carriers which may be older and less desirable. At times, it appears that they may have to forego shipments where no cars are available. At the same time railroads with a high ratio of terminations to originations, net per diem debtors, have equivalent problems. With large numbers of cars of other railroads delivering freight to points on

their lines, they are required by the AAR Car Service Rules to place outgoing loads in such cars, losing the opportunity to earn per diem credits by use of their own cars. Delays, justified or not, in the return of cars to owners, have engendered criticism and allegations of abuse of car service rules in this respect. The problem is also intimately connected with that of the adequacy of the total supply of cars available to carry the nation's commerce.[10] No small part of the present dispute arises from the desire to use the compensation payments as a method of enforcing the car service rules governing the return of foreign cars,[11] or as a method of solving the problem of car shortages. As pointed out in *Palmer* v. *United States*, 75 F. Supp. 63, the only power vested in the Commission is to establish reasonable compensation for the use of the cars. "The penalty or incentive characteristic of the per diem is merely an inherent quality of a charge based upon time." (p. 68).

Certain fundamental distinctions exist which make this problem different from, and render of little guiding value,

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[10] Presently the subject of a separate proceeding, *Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices*, Ex Parte No. 241, 323 I. C. C. 48. Proposed legislation to authorize the Commission to consider this factor is pending before the Congress of the United States. Even if such authority is conferred, however, it remains essential to ascertain in the first instance the charges which, as precisely as possible, are necessary to compensate car owners for their ownership costs, and the manner in which these costs may be fairly distributed among users.

[11] The term "foreign cars", as used herein, has reference to a car which is not, at the time, on the owner's tracks. See Appendix A. The "penalty" theory, designed to induce prompt return of cars, has played no small part in the approach to solution of the per diem problem. See, for example, *Car Shortage—Insufficient Transportation Facilities*, 12 I. C. C. 561, 573. In that case the difficulty of dealing with enforcement of car service rules via the per diem route was noted. Section 1(14)(a) of the Act now confers power on the Commission to make and enforce rules respecting car service.

the cases and arguments which have to do with the charging of rates by railroads, utilities, or other businesses to their customers. In the latter cases, the charge is for the services or articles being sold, out of which charge must come the cost and profit to the particular industry. It must contain the element of bringing in additional capital over and above that expended in providing the service or article to the user. The function to be performed by the per diem charge, and the responsibility of the Commission, is to ensure an equitable sharing of the ownership burden when railroads make use of cars of other lines. That burden is comprised of the costs of acquiring the car, taxes assessed thereon, and the cost of repairing and maintaining the car as an effective revenue producing piece of equipment. The problem is not one of fixing rates, in the customary sense, but of ascertaining the burden and providing a method by which it may be fairly shared by all users, *including the owner when acting as a user of its own car.* Since the car owner is to be made whole, it is first necessary to ascertain what amount will be necessary on an annual basis to accomplish this result.

*Cost Section Studies*

To facilitate the investigation in Docket No. 33145, the Commission incorporated in the order of investigation an order under Section 20 of the Act, requiring the filing of special reports by the carriers. The tentative form of these reports and the nature of the studies to be accomplished in preparing them were thereafter established as a result of conferences between attorneys and accountants for interested parties, a representative of the Association of American Railroads (AAR), and staff members of the Cost Finding Section, Bureau of Accounts, of the Commission. After a formal pre-hearing conference, at which copies of the proposed forms were distributed, all parties were afforded an opportunity to file verified statements for or against them, and thereafter to file rebuttal state-

ments.[12] After study of these statements and consideration of the contentions of the parties, the final form of the reports was determined by the Cost Section staff and served on all railroads. Only the Class I line-haul roads were required to complete all of the forms. Other roads, including short lines, switching and terminal companies and electric railways were required to complete only Forms 1, R-1A, and 10. The nature of the special studies which were made is indicated by the list of reporting forms, as follows:

Form A — Preliminary Survey of Equipment Repair Facilities.

1 — Special Study of Freight-train Car-miles and Car-days.

R-1A — Report of Per Diem Days and Payments.

2 — Special Study of Amounts charged to Account 314 for Direct Wages Applicable to Freight-train Car Repairs.

3 — Special Study of Amounts Charged to Account 314 for Direct Materials Applicable to Freight-train Car Repairs.

4 — Summary of Special Study of Work of Freight-train Car Inspectors.

5 — Separation of Account 314—Freight-train Cars—Repairs.

6 — Separation of Number of Cars, Original Cost, Equipment Obligations and Interest thereon, Appli-

[12] The participation by the respondents in the preparation of the forms did not, of course, make binding upon them the results of the studies made. In some instances certain respondents did not agree that the proposed studies would produce reliable results, and evidence, subsequently offered, challenging those results is considered later in this report.

cable to Freight-train Cars, between Per Diem Cars and All Other Freight-train Cars.

7A — Special Study of Switch Engine Hours Applicable to Freight-train car Repairs.

7B — Non-revenue Freight Used in Equipment. Repairs.

7C — Maintenance of Power Facilities for the Year 1960.

7D — Analysis of Certain Items Reported in Annual Report, Schedule 376—Hire of Freight Cars, for the Year 1960.

7E — Maintenance of Work Equipment.

7F — Maintenance of Miscellaneous Equipment.

8 — Taxes Applicable to Freight-train Car Ownership.

9 — Analysis of Relation Between Investment in Shops and Enginehouses and Cost of Repairs Made in Such Facilities.

10 — Survey of Car Accounting Methods.

11 — Special Study of Accounting for Repacking of Journal Boxes.

The studies were accomplished during the calendar year 1960 and, during the course of that year, the Cost Section sent to the respondents a series of five documents of explanatory matter, based upon questions raised regarding the studies. Special arrangements were made to assign field examiners of the Bureau of Accounts to assist, and 34 such examiners were used for this purpose. During the study period they made 97 visits to 69 shops, train yards, or railroad offices, located in 29 different states.

Their reports were sent to the Cost Finding Section and, if any discrepancies appeared in the manner in which the carrier was conducting the special studies, correction thereof was requested. Certain of the forms were required to be filed for the first quarter of the year and, after audit thereof, and testing their results against 1959 reported data, any data which appeared of doubtful accuracy was referred to the particular carrier for further check.

On May 23, 1961, there was appointed an Industry Advisory Committee on Per Diem Costs consisting of representatives from the Baltimore and Ohio, Chicago, Burlington & Quincy, Illinois Central, New York, New Haven and Hartford, Long Island and Boston and Maine Railroads, and the American Short Line Railroad Association. The views of this group were sought, after conference with staff members of the Cost Finding Section, as to a proposed treatment of the deficiency of the reimbursement for the repairs of foreign per diem cars.[13]

The special studies were accomplished, and reported on the prescribed forms, by 104 Class I Line-haul Railroads. To the extent they were required to do so, reports were also received from other lines, as follows:

| | |
|---|---|
| Class II Line-haul Railroads | 72 |
| Class I Switching & Terminal Companies | 27 |
| Class II Switching & Terminal Companies | 45 |
| Line Haul Electric Railways | 3 |
| Other Electric Railways | 8 |
| Total Short Lines | 155 |
| Class I Line-haul Railroads | 104 |
| Total Reporting Roads | 259 |

[13] More fully described subsequently herein.

From the information received as a result of these special studies, and the annual reports of the carriers, together with certain data obtained from the Section of Valuation of the Bureau of Accounts, the Cost Finding Section made a series of cost computations, more specifically described below, which were subsequently received in evidence after extensive cross-examination of the staff officials responsible for their preparation. The Cost Section also prepared and offered in evidence a cost formula for consideration by the Commission, designed to develop costs of per diem car ownership, should it be concluded that prescription of a formula was desirable.[14]

The results of the Cost Section's computations are presented in four tables which are designated Summary T-1, Summary MT-1, Summary MT-2, and Summary MT-3.[15] Summary T-1 computes a single-factor, per diem unit cost for foreign per diem cars, in a manner similar to that heretofore employed by the AAR for the same purpose. It makes no allowance for age, value or type of cars, nor does it separate mileage costs from other types of costs. As computed, based upon 1960 figures, it indicates a unit cost of 249.903 cents per car per day.[16]

This Summary also computed a total and a daily average amount of deficiency in the reimbursement received by railroads for repairs made by them to cars of other lines amounting, using 1960 figures, to 41.417 cents per day.

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[14] This formula is designated by the Cost Section as Rail Form H, No. 7-62, *Formula For Use In Determining Per Diem Charges For The Use Of Freight—Train Cars.* It will be referred to hereinafter as Form H.

[15] The cost analyses supporting these summaries are also contained in the exhibits of the Cost Section.

[16] The methods used by the Cost Section to reduce annual costs to daily costs are set forth in more detail in discussing issues connected therewith.

Summary MT-1 separates unit costs for all per diem cars into those attributable to mileage, and those attributable to all other causes, the latter being designated as "time" costs. This was accomplished by separating ownership costs for all cars according to percentages for mileage and time, developed by the Valuation Section of the Bureau of Accounts. The total mileage costs were reduced to a unit cost per car mile by dividing by the total line-haul and switching miles, after adjusting the latter by a factor purporting to reflect the greater repair costs engendered by switch movements. The time portion of the total costs was divided by the total active per diem car days for all railroads to develop the unit cost per active car day. The cost per mile thus developed, using 1960 figures, was 2.323 cents, and the cost per car day, 148.738 cents. These figures were not designed to directly ascertain car rental costs, since railroads do not maintain car records of switching mileages, but the figures were computed as a necessary step preliminary to the computations in the following summaries. Both Summaries T-1 and MT-1, employ the original cost of freight cars and of freight car repair facilities as a basis for the computation of depreciation and interest on depreciated investment. Since one of the contentions in these cases involves the choice between use of original and reproduction costs, the Summaries were each provided with an alternative calculation based upon the latter theory, by which they may be adjusted.

Summary MT-2 develops a unit daily cost for each of the Class I line-haul railroads separately, and for Class II roads by groups, as well as individually for the defendant railroads in Docket 31358 and for the various different groups of reporting railroads in the special study program. In this Summary the unit daily costs are computed to show the amount each railroad, or group of roads on an average, contributes to the costs of ownership of foreign cars on their lines taking into account the

average mileage over which they move such cars. It differs from Summary T-1 in that while still designed to return to car owners their full costs of ownership, it attempts to refine the data so as to reflect differences between using lines measured by the use they make of the cars. Thus, for each railroad in this Summary, the mileage cost developed in MT-1 is multiplied by the 1960 line haul and equated switching [17] car miles of foreign per diem cars on the particular carrier, and the result divided by the per diem days paid for by that carrier in the same year, to reduce the mileage charge to a daily amount. Similarly, the time cost developed in Summary MT-1 is divided by the particular carrier's daily average ratio of active foreign per diem cars on its line to total foreign per diem cars on its line, to produce unit time costs per total car day. Addition of the time costs, and the mileage costs reduced to a time basis, produces a daily unit charge applicable to each carrier, or group of carriers, for which the computation was made. The unit cost for all U. S. railroads computed by the method in MT-2, which is comparable to the unit cost of 249.903 cents per day in Summary T-1, is 277 cents, made up of a mileage factor of 138 cents and a time factor of 139 cents. The difference results from giving effect to mileage, since foreign per diem cars run more miles per day than the combined average of all per diem cars. Like Summary T-1, there is included in this computation no allowance for age, value or type of cars. The deficiency in user roads recovery of repair costs, developed in Summary T-1, may be directly applied to the results reached by application of the MT-2 formula.

Summary MT-3 furnishes an alternative method of calculating the per diem car rental costs chargeable to individual user railroads, taking the mileage factor into account, but without computing a daily rate based upon each

[17] See Footnote No. 128, below.

carrier's average operations. It is designed to develop, rather, time charges based upon the time each car is actually retained by the user road, and mileage charges based upon the mileage each car is actually moved by the user road. The factor for average switching costs is reduced to a daily amount and included in the time costs, resulting in a daily charge of 149 cents. The mileage cost of 2.323 cents developed in Summary MT-1 is applied to line haul mileage only. Use of this method requires that precise car records be kept showing, not only the days each foreign per diem car is on line, but the total miles traveled by it.

At the hearings it appeared that other factors, such as the age, value, or type of car, might deserve consideration. As a result, the Cost Section, utilizing the data and computations heretofore described, made certain additional calculations to the extent possible within the limits of available information, tending to show the results of computing costs using each of the four formulas, T-1, MT-1, MT-2, and MT-3, with depreciation and interest on depreciated investment computed on different car values, using both original and reproduction cost bases. Since the special studies did not provide for separation of repair costs, etc. by value of car, it was assumed that all costs other than depreciation and return would remain the same, regardless of the value or age of the car. For convenience of comparison, the value brackets used in this computation are the same as employed in the AAR multi-level rates now in effect. Issues concerning the details and results of the Cost Section studies are considered subsequently in this report.

### A. A. R. Calculations

Per diem calculations by the AAR staff during the past 15 years, have followed the same general pattern but have differed in their details with respect to each

rate. Cost statistics for a recent 12 month-period have been used in each instance and figures developed for repairs to cars, property taxes, depreciation on cars and on apportioned value of shops, enginehouses, power plants and shop and power plant machinery, interest on depreciated value of the same, apportioned cost of general expense, miscellaneous maintenance of equipment accounts, maintenance of shops, enginehouses, etc., interest on investment in stock of freight car material, interest on working capital, and deadhead haul cost of repair material. Each was divided by a car day divisor to develop a unit cost per day, and the results totalled. Generally the AAR staff calculated alternative costs, using different bases, such as ledger value, reproduction value, etc., leaving to the General Committee and the Board of Directors of the AAR the decision as to which result should be submitted to the subscribers to the agreement for vote.

The car day devisor has regularly been computed by taking the average of the ratios, for varying numbers of years, which total cars, less bad order and surplus cars on owners' lines, bore to total cars. This average ratio, applied to the number of days in the year for which the cost statistics were calculated, produce a figure referred to as "active car days per car per year" which was multiplied by the average number of cars in service during that year.[18] Prior to the calculations supporting the $2.40 rate, periods of from five to fifteen years had been used. For all the rates now in issue, the average of car utilization ratios for the preceding twenty-year period were used.

For the calculation of car repair expenses, the costs of the most recent year were used in calculations supporting

[18] The calculations supporting the $2.88 and multi-level rates differed, in that two car day divisors were employed. The total cars at the end of the year was employed to calculate unit cost of depreciation and interest on freight cars while the average of the cars in use at the beginning and end of the year was used for all other costs.

the $2.75 and earlier rates. In the calculations supporting the $2.88 and multi-level rates, the repair expenses for the most recent five year period were averaged, after adjusting them to the wage and price level of the most recent year.

Depreciation on freight cars has always been calculated on a straight line basis at the average of rates used by the carriers and approved by the Commission, except that calculations supporting the multi-level rates used a flat three percent rather than the average of 3.06 percent. Beginning with the calculations supporting the $2.40 rate, reproduction cost of the cars was used as the base for depreciation. Depreciation on apportioned value of shops, enginehouses, etc., has been based upon original cost in all calculations except that supporting the $2.40 rate, when the reproduction cost basis was employed.

Interest on investment has been calculated at six percent before taxes on both freight cars and repair facilities, using the average of depreciated original and reproduction costs as a base for the $2.40 rate and depreciated reproduction cost as a base for subsequent rates. Prior to the $1.50 rate the calculations had differed, with depreciated original cost used as the base for interest on repair facilities.

In developing the multi-level rates, the AAR staff calculated the annual costs per car for all items mentioned above except interest and depreciation on freight cars. The latter were separately calculated with respect to each of the value brackets, using reproduction cost as a base. Inauguration of rates graduated according to the value of the car imposed substantial changes in the system which had theretofore prevailed in accounting for the compensation payments. With a single rate applicable to all cars, carriers had only to determine from the junction reports, showing when cars were received and delivered to each carrier, the total number of days per diem to be multiplied

by the rate. It is now necessary to determine the number of days for each car and the rate bracket applicable to that car, calculating charges on each car separately.

Administration of the multi-level rate system was established by the organization of a Control Center within the Operating-Transportation Division of the Association of American Railroads. On March 29, 1963, the Board of Directors of the AAR authorized an appropriation for this purpose, to acquire office space, equipment, data processing machinery and necessary employees. The first instructions to all United States, Canadian and Mexican railroads were sent out on May 6, 1963, and revised on June 25, 1963. They included forms for reporting all cars at their original cost, and the amounts of additives to those costs, if any, together with sundry information including the year installed, whether new, rebuilt, or second-hand, AAR mechanical designation, etc. A table was included from which the multi-level rate applicable to each car could be ascertained. A standard punch card method of reporting the same data was provided for car owners having the equipment for this purpose. Where owners reported on the forms, the cards were punched at the Control Center.

All railroads had reported, as requested, by the latter part of September, 1963 and a preliminary Master List of all per diem cars was distributed to all railroads on October 10, 1963, listing 1,706,414 cars in alphabetic code, mechanical designation and car series order. Also distributed on that date was a preliminary alternate Master List covering the same cars but listed without regard to mechanical designation. To the railroads submitting requests therefor, there was distributed the same data on magnetic tapes and on master series decks of cards, for use in appropriate data processing machines. Between September and December 31, 1963, numerous corrections to the reports were submitted by the railroads, caused by

cars retired, installed, changes in mechanical designation, and changes in valuation. All were processed through the end of the year and, on January 15, 1964, Master List No. 1 and Alternate Master List No. 1, in written as well as magnetic tape and punch card form, were distributed. The function of the Control Center thereafter was, and will continue to be, the processing of reported changes in cars and the monthly publication of corrections to the Master List. The first three such publications in 1964 contained, on an average, about 5,000 changes each.

In choosing a rate to be submitted to the members of the per diem agreement for vote, the AAR officials customarily have considered the various calculations received from the staff, on occasions revised them in some respects, and rounded off the results to produce an even number of cents per day. Thus calculations of $2.76961 and $2.87940 were rounded to $2.75 and $2.88. While the validity of the calculations used in ascertaining the costs have been challenged in these proceedings, it is clear that the AAR rates have purported to do no more than equate the daily ownership costs of freight cars in per diem service. The multi-level rates which became effective on January 1, 1964, are as follows:

| | Value Bracket | Per Diem Rate |
|---|---|---|
| (1) | $ 1,000 and less | $2.16 |
| (2) | 1,001 to 5,000 | 2.79 |
| (3) | 5,001 to 10,000 | 3.58 |
| (4) | 10,001 to 15,000 | 4.50 |
| (5) | 15,001 to 20,000 | 6.15 |
| (6) | Over $20,000 | 7.74 |

On April 1, 1965, following the close of the hearings in these proceedings, a further revision was made in the

scale of multi-level rates, of which official notice is hereby taken. This revision substituted four new brackets for cars formerly covered by Bracket No. 6, as follows:

| | | |
|---|---|---|
| (6) | $20,001 to $25,000 | $7.11 |
| (7) | 25,000.01 to 30,000 | 9.00 |
| (8) | 30,000.01 to 35,000 | 10.18 |
| (9) | 35,000.01 and over | 12.18 |

Assignment of cars to appropriate brackets is accomplished on the basis of their depreciated original cost plus additions and betterments. When cars were built in their own shops, car owners may include in the original cost certain expenses which may not have been capitalized at the time of building. These so-called "additives" are challenged by Southern Railway, and are treated subsequently herein. This carrier urges a third method of calculating per diem rates, which differs from both the AAR method and the calculations of the Cost Section. With some exceptions it accepts the Cost Section calculation of repair costs, but supports rates based upon recovery of capital costs by depreciating original cost over a 14 year period, instead of 30, using a double declining balance method, and allowing 8 percent interest before taxes on the undepreciated balance. These contentions are considered further in other sections of this report.

Although all common carriers by railroad in the United States are affected by the payment of per diem rates, the matter is of particular interest to those which, on an annual basis, are net creditors or debtors by appreciable amounts. While numerous carriers appeared and participated in the hearings, the parties filing briefs, and actively concerned with these proceedings may be identified as follows:

(1) Complainants in Docket No. 31358, supporting the past AAR rates.

(2) Defendants in Docket No. 31358, opposing the past AAR rates.

(3) The "20 Road" Group.[19]

(4) The NYC, PRR, C,M, St. P&P, and the Lehigh Valley.

(5) The NY, NH&H, and the B&M.

(6) The Long Island and the New Jersey and New York Railroads.

(7) The Southern Railway System.

These groups are by no means mutually exclusive, there being a number of overlapping memberships. Thus, for example, the NYC group, while also complainants in Docket 31358 and supporting rates there based solely on time, favor a time-mileage system for the future. Most of the other complainants are in the "20 Road" Group, and oppose time-mileage for the future. The NY, NH&H group and the Long Island group favor a time-mileage system as does the NYC group but, unlike the latter, oppose use of reproduction costs. Southern Railway, which also opposes use of reproduction costs, supports a time only rate substantially higher in the early years than the AAR rates which are based upon such costs. For the purposes of this report, the issues have been grouped into those respecting the car day divisor, the ownership re-

[19] Great Northern, Northern Pacific, Chicago, Burlington & Quincy, Colorado & Southern, Atchison, Topeka, and Santa Fe, Illinois Central, Denver & Rio Grande Western, Western Pacific, Louisville & Nashville, Gulf, Mobile & Ohio, Western Maryland, Union Pacific, Southern Pacific, Norfolk & Western, Atlantic Coast Line, Seaboard, Missouri Pacific, Texas & Pacific, Soo Line, St. Louis-San Francisco, Chesapeake & Ohio, Fort Worth & Denver, and Baltimore & Ohio.

pair and maintenance costs, ownership capital costs, (including taxes), and alternate proposals for the construction of charges. Determination of the ownership burden and its distribution among users are then considered, followed by consideration of the past rates.

## II—Car Day and Car Mile Divisor

Reduction of the total annual cost of car ownership to an amount per car per day, whether all costs or only those attributable to the passage of time are used, requires ascertainment of the number of car days to be used as a divisor. It has been customary to exclude from total possible car days, the car days of unserviceable cars requiring repair and cars which, for lack of available employment are considered surplus. In other words, the cost of the per diem fleet must be spread over and borne by the cars engaged in earning revenue. Two special studies in Docket 33145 were carried out to supply working data for this purpose. The first provided a seven day sample of car miles, a twelve day sample of number of serviceable freight-train cars on line, a seven day sample of number of "No-Day" cars [29] on line and of cars out of service due to repairs. The latter sample was subdivided so as to show separately cars on repair tracks undergoing or awaiting repairs, cars on repair tracks repaired and awaiting switching, cars on storage tracks awaiting switching to repair tracks, cars held in train yard awaiting movement to repair tracks, cars moving empty in trains en route to shops, cars stored awaiting disposition, and other cars. Another seven day sample was taken of surplus per diem cars, also subdivided to show the cause. Surplus cars were ascertained by a count of serviceable empty cars on hand at 12:01 A. M. of the next day follow-

[29] "No-Day" cars are those for which no per diem charge accrues due to their being received after midnight and delivered before the succeeding midnight.

ing a test day which had not been placed for loading, and a similar count made 48 hours later of those same cars to establish the number which had not been placed for loading in the meantime. Another study called for a report from the carriers, subdivided by type of car for the year 1960, showing per diem payments and receipts, and reclaim payments and receipts, together with a report of per diem days receivable by type of car, for cars on railroads outside the United States.

In developing the car day divisor for 1960, the Cost Section averaged the total freight train cars in service at the beginning and end of the year to obtain 1,685,910 cars. Analysis of the special studies and reports heretofore described developed that 44,710 of these cars were not in per diem service, leaving 1,641,200 as the average number of per diem cars in service in 1960. There was thus indicated a possible 600,679,200 car days of per diem cars for the year.[20a] The studies of bad order cars and surplus cars developed deductions of 59,029,930 car days and 68,565,413 car days, respectively, owing to these two causes. The balance of 473,083,857 active car days, divided by 1,641,200 cars in service, produces 288.25 active car days per car for the year 1960.

The active car days per car, as developed from the cost section studies, furnishes a measure of the days, on an average, that each car was engaged in revenue producing service.[21] While it provides a measure of the days over which the revenue from its service may be spread, it is not a satisfactory measure of the days over which ownership costs should be spread. Per diem payments by users are made, with unimportant exceptions, for each day a foreign car is on line, whether or not in a surplus or bad order

[20a] 1,641,200 cars multiplied by 366 days.

[21] This term, as used here, includes empty return movements, as well as loaded movements and days cars are in possession of shippers or consignees.

category.[22] Payments are thus made for days excluded in the calculation of the 288.25 days mentioned above. For this reason, the cost section calculations did not separately compute the active car days per car, but employed the unit costs per active car day as a step in computing the daily costs for foreign cars spread over the total days in 1960 on which per diem payments were made. The active days of per diem cars on foreign lines was multiplied by the unit cost per active car day of all per diem cars to produce a total cost for cars on foreign lines. This amount was then divided by the total days on which per diem was paid to spread the cost over the total number of payments. In Summaries MT-1 and MT-2, the mileage factor was reduced to a daily figure in a similar fashion by dividing the total mileage cost by the car miles of all per diem cars. The cost per car mile was then multiplied by the total mileage of foregn per diem cars and the result divided by the per diem days paid for.

It is apparent that fairness to users of foreign cars requires that total ownership costs of such cars be spread over the total days for which payments are or should be made, rather than over total active car days only. The 1960 Cost Section studies indicated a total of 223,887,324 active car days of per diem cars on foreign lines, and a total of 237,908,943 days for which per diem was paid for such cars. The indicated ratio of per diem payable days to active car days is 1.06263. Applying this ratio to the 473,083,857 total active car days of all per diem cars, produces some 502,715,000 per diem payable days, or about 306 per

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[22] For various reasons, and pursuant to particular arrangements, certain reclaims are permitted or per diem charges waived. In 1960 the difference between total foreign per diem car days on line and total days paid for was 1,054,653 days, less than ½ of one percent.

diem payable days per car per year, for application to the total costs of all per diem cars.[23]

An appreciable difference exists between the car day divisor as computed by the Cost Section methods and those used by the AAR in the calculations underlying the various per diem rates in issue. The analysis underlying the rate of $2.88 employed a figure of 332.59, days per car based upon the average of utilization ratios for the twenty year period, 1939 through 1958. Calculations underlying the multi-level rates employed a figure of 335.33, using the average for the period 1942 through 1961. For the year 1960, the figure calculated in the same fashion is 322 days, some 33 days more than the 306 developed by the special studies. The difference stems in part from the AAR system of computing directly a divisor applicable to the total costs of all cars instead of separating the costs attributable to foreign per diem cars, as did the Cost Section. The most significant differences are as follows:

First: The cost analyses underlying the AAR rates, in calculating the total possible per diem car days, did not exclude cars not in per diem service. Thus, for the year 1960, the figure used was 1,685,910, rather than 1,641,200. The former figure admittedly includes cabooses and other cars not used in per diem service. Its use resulted in an excess of 16,363,860 possible car days for that year. The same method was used throughout the process of averaging the twenty year periods. While the AAR calculations did not exclude the car days of cars not in per diem service, it appears that they neither excluded the costs attributable to such cars. Inclusion of the costs and car days of the extra cars would introduce error into the calculations only to the

[23] The same result may be reached by dividing the total ownership costs for 1960 as computed by the Cost Section, $1,256,295,212 by the calculated Summary T-1 cost of $2.499 per day, and then dividing the required number of total per diem payable days so indicated by 1,641,200 cars in service.

extent that these cars incurred costs substantially different from those of per diem cars.[24]

Second: In calculating "active" car days, the AAR deducted only the surplus and bad order car days of cars on owner's lines. All days of cars on foreign lines are treated as active. By including the surplus and bad order car days of foreign per diem cars the divisor was enlarged, producing, in relation to costs of all cars, and with somewhat less accuracy, an effect similar to the Cost Section recognition of the greater significance of per diem days paid for.

Third: The deduction for surplus cars used by the AAR appears greatly underestimated. Members of the AAR regularly report to that organization, on Form CS-44, the number of surplus cars on hand, both home and foreign. A one-week test in February, 1949, indicated that approximately 1.6 percent were foreign cars and thereafter the amount to be deducted for surplus cars was reduced by this percentage. As reported, the daily average figure for home and foreign surplus cars for 1960 was 36,672. Reduced by the factor above mentioned to eliminate foreign cars, and multiplied by 366 days, produces a figure of 13,421,952 surplus car days, less than 20 percent of the number indicated by the Cost Section studies.[25]

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[24] The 1960 studies indicate that the non-per diem cars constituted less than three percent of the total. See also: *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I. C. C. 383, 387.

[25] On the other hand, the deduction as computed by the AAR for home cars out of service due to repairs exceeds that indicated by the special studies. Members of the AAR report on Form CS-60 the home per diem cars out of service for this cause. A test in September, 1950, indicated that these reports were understated some 23.4 percent. In subsequent per diem cost calculations they were increased by this percentage. For the year 1960, the reported number of 132,597, thus increased, and multiplied by 366 days, produces 59,886,640 bad order car days. The special studies indicated 54,198,734, a difference of about 10 percent.

The 1960 studies were based upon actual counts of cars on hand and not placed for loading at the beginning and end of a 48-hour period. The reports on CS-44 are based upon the judgment of each carrier's personnel. The latter require that each carrier estimate, at the end of each day, the empty cars on hand at loading stations in excess of the number needed for the next days loading. It is a figure which the AAR witness conceded was not very accurate, was generally understated, particularly in periods of car shortage, and subject to a "psychological factor." For the purpose of these proceedings the figures resulting from the 1960 studies, and the car day divisors produced thereby, must be taken as the more reliable.

The car day divisor used by the Cost Section was based solely on 1960 statistics, and was applied to 1960 costs. In past computations used to develop the per diem rate, the AAR has employed a somewhat different approach. Using various periods of time, from five to twenty years, the average of the annual ratios of "active"[26] to total cars has been developed, and that average ratio multiplied by the number of days in the year[27] to obtain "active car days per car per year." This figure has then been multiplied by the average number of cars in use during that year. In its 1949 decision,[28] the Commission said:

> "The per diem rate could be revised upward and downward periodically to conform to annual fluctuations in the number of active cars, and if based on the approximate costs of ownership and maintenance and active cars for a designated recent year it could not be said to be unreasonable. Or the rate

[26] The AAR uses the term "active cars" to include all cars owned or leased in the year less bad order and surplus cars on lines of owners.

[27] The "year" referred to is the year whose cost statistics were employed in the AAR calculations.

[28] *Alabama, T. & N. R. Co. v. Aberdeen & R. R. Co.*, 274 I. C. C. 383, 389.

> could be determined by the use of an active-car ratio based, from time to time, on the average number of active cars in use over a representative period of years, and, if predicated on the approximate costs of ownership and maintenance for a designated recent year, the rate so fixed could not be said to be unreasonable. Stated differently, there is a rather wide zone of reasonableness within which the carriers may establish a lawful per diem rate. The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10, or 15 years."

There can be little dispute that where the object of the computation is to ascertain the cost per active car day for any given period, not only must the actual costs incurred in that period be employed, but also the actual active car days for that same period. Per diem charges, however, are established for use in the future, and the employment of a car day divisor based on an average active car day ratio over a longer period stems, in part at least, from the desire to approximate the average conditions of car use to be anticipated. Use of the longer period is founded in the assumption that the rate being established will remain in effect over a number of years, during which the average car usage will prevail. The AAR approach, however, assumes that the per diem costs for the year of computation (or the 5 year average as used more recently) will be representative, but that the active car ratio for that same period will not be representative, of the future years; an assumption which appears somewhat inconsistent. Another purpose was mentioned by the Commission in the 1949 decision, as follows:

> "The use of an active car divisor predicated on average age would result in the maintenance of a

> relatively high per diem rate when traffic is heavy and cars are in urgent demand, and a per diem rate relatively low when traffic is light and many thousands of freight cars are idle." 274 I. C. C. 383, 389.

It is apparent that the foregoing rationalization is true only if the divisor chosen actually represents the approximate mean of car usage conditions over the future years during which the computed rate will apply.[29]

The evidence in these cases is convincing that a substantial part of the car repair costs in any year varies with the amount of use given the car in that year, and that, generally, the total industry-wide repair work undertaken varies with the overall demand for cars. Unless the average car day divisor is applied to the average per diem costs for the same period of time, it does not measure the ownership costs for the past. If the average of a period of past years is to be chosen as a measure of future car utilization, the same measure should apply to costs, and it should be because of some demonstrated relationship between the past and expected future usage. The fact that the average age of all cars in interchange service, some

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[29] Nor is there any reason to conclude that the failure to compensate the owner in light traffic years would be balanced by "over-compensation in heavy traffic years. Cars move or remain idle depending upon shipments offered, not upon the influence of per diem charges which attempt to simulate a free market condition. The suggestion is not new, however. See the dissenting report of the Director of Maintenance and Operation, Union and Southern Pacific Systems, to the Report of Commission on Interchange of Freight Cars, (McCrea Report) Proceedings of the American Railway Association, Vol. 5, 1909, page 916. The sometimes-mentioned theory that per diem rates should be set higher when cars are most needed than when traffic is light appears completely repugnant to the principal of equitable sharing of costs. See comment in *Car Shortage—Insufficient Transportation Facilities*, 12 I. C. C. 561, 573.

over 50 years old, is about 20 years, has no apparent relationship to the annual car usage nor does it warrant the conclusion that the average usage over that period is a sound measure of average car usage conditions for an indeterminate period in the future.[39] See *Boston & Maine Railroad* v. *United States*, 162 F. Supp. 289, 297.

The AAR has experimented with the use of 5, 10, 15 and 20 year periods to estimate the car utilization to be anticipated in the future, without any apparent logical basis for choosing the particular period. The record in these proceedings does not provide any rational basis to support such a choice. Should there occur a violent fluctuation in car utilization between two consecutive years, per diem rates based upon the first might be unrealistic for application in the second, but the record does not indicate that such fluctuations are normally to be expected. Between 1946 and 1961, the utilization as computed by the AAR varied from 86.12% to 95%. The greatest change occurred between 1957 and 1958, a drop of 6.7%. Generally the difference between any two years was less than 4 percent.

For reasons mentioned subsequently herein, the Examiner is of the opinion that per diem costs may be calculated annually and the rates reviewed on a yearly basis, while such annual review does not necessarily imply a change in the rates at similar intervals, it renders unnecessary the attempt to approximate conditions over a span of future time by reference to any fixed span of past time. A change in rates would not be required by the results of operations over a year of demonstrably unusual conditions unless there was reason to anticipate their continuance. Projected utilization for the following year could be more reliably estimated by application of experienced judgment

[39] Comparative analysis of the predictive reliability of car utilization ratios for the single prior year, and the average of periods of 5, 10 and 20 prior years, indicates the use of the single prior year would have been more accurate

to the existing economic conditions, the experience of the past years, and the trend, if any, in the utilization factor, than by uncritical reliance upon an average of any number of past years.

To the extent that any portion of the car user charges is measured by mileage, it is necessary to calculate a figure similar to the car day divisor, in order to equitably spread the costs attributable to this factor over the miles operated. Calculations of this nature have not been necessary under the basis of rates used in the past, and the only evidence available in this record is that developed by the special studies in 1960. Data reported on Form 1 produced total figures for daily average line haul car miles of all carriers for home and foreign per diem cars. Deducting the average number of surplus cars on line from the average serviceable cars, produced a figure for average active cars which, divided into the average car miles, indicated that the average distance traveled by home per diem cars was 32.3 miles, by foreign cars, 58.0 miles and by all per diem cars, 44.5 miles, per active car day. A separation of the amounts reported on Form 1 between eight classes of cars suggests that appreciable differences exist in the utilization which should be reflected in the mileage portion of the charge. Thus, TOFC cars are reported as averaging 226.9 line haul miles per active car day, stock cars, 93.8, box cars, including automobile cars, 60.8, other flat cars, 50.4, closed hoppers, 44.8, open hoppers, 31.2, and gondolas, 26.5. While this breakdown is possible from the data reported on Form 1, that study was not designed to ascertain average mileages by classes of cars, and was not stratified with that purpose in mind. In some instances, such as the TOFC cars, a relatively small number of cars was involved, and the cost section witness indicated doubt as to the extent to which reliance could be placed upon the average. In these circumstances it would not be proper to attempt the calculation of mileage charges varying with the type of car, in reliance upon the information now avail

able. Appropriately designed samples should be promptly taken, however, and such calculations made if differences such as are suggested by this record proved to exist. On the evidence it is found that, for present purposes, an average car mile divisor applicable to all cars must be employed. In this connection the comments in Section IV-A of this report are applicable. See Pages 43 et seq.

## III—Ownership Repair Cost

### A—*General.*

In its 1955 decision, the Commission observed that freight car repairs constituted the largest single category of expense included in the car rental charge, amounting to some 40 percent of the total.[31] The special studies conducted by the Cost Section during 1960 were, in large part, directed to the problem of analyzing the cost of repairs to per diem cars and development of data which would aid in resolving some of the issues raised in respect to those costs. Particular attention was given to separation of the expenses charged to Account 314 which, as noted in the 1955 report, is the largest of the primary operating expense accounts embracing nearly 10 percent of total freight expense. The basic separation in connection with all repair expenses was between home and foreign per diem cars, with repairs to each separated between owner and user responsibility work.[32] Two sample studies were made, using Forms 2 and 3, heretofore mentioned, and covering seven periods of two days each at intervals

[31] The report in *Alabama, T. & N. R. Co. v. Aberdeen & R. R. Co.*, 274 I. C. C. 383, indicates that repair costs were, in 1946, about 44 percent of the total costs employed in fixing the per diem rate.

[32] Definitions of these and other terms used in the studies are set forth in Appendix A to this report. The distinction is necessary to insure inclusion in the per diem charge only those costs which should fairly be shared by all users. Repairs due to improper use of the car are not shared under this separation.

during 1960, to develop the proportion of repair wages and materials applied in each of these categories by repair facilities. Another test, using Form 4, covering seven test periods of one day each at intervals during the year, was conducted to develop the proportion of wages of car inspectors assignable to various of their functions, including repairs made by them in train yards. This study also sought to develop the cost of materials used in the making of such repairs and the consist of the trains inspected. These studies were carried out by all Class I line-haul carriers, and analysis thereof indicates that about 79 percent of all wage and material costs were items of ownership responsibility and seven percent items of user responsibility. The remaining 14 percent involved non-per-diem cars which are not involved in these proceedings.[33] The total ownership repair costs for 1960, as computed by the Cost Section, amounted to $583,715,117, and comprised over 46 percent of the total expenses included in the per diem cost calculation.

Account 314 was analyzed by each Class I line-haul carrier on Form 5, for the year 1960, so as to show separately the following items:

1. Freight-train car repair wages.
2. Freight-train car repair materials.
3. Amounts paid to and received from other railroads on account of car repair work.
4. Wages—train yard inspection.
5. Payments for foreign cars destroyed, less salvage.
6. Switching expenses in connection with freight-train car repairs.

[33] In all studies, non-per diem cars, including cabooses and mileage cars were excluded, and the costs applicable thereto separated from the analysis.

7. Miscellaneous items in account 314, including general shop employees, power, heat, light, etc.

Repair wage and material costs for the entire year, as thus segregated, were separated between per diem ownership expenses and other expenses on the basis developed by the sample studies made on Forms 2, 3, and 4. A separate sample study included in Form 5, conducted during four months, one in the middle of each quarter of 1960, was used to analyze the amounts paid to and received from other railroads on account of car repair work. The results were employed to separate the total of such payments and receipts in Account 314 between owner and user responsibility. Miscellaneous items in Account 314 were assigned to ownership costs on the basis of the repair, train yard inspection and switching costs shown in that account. Form 4, heretofore mentioned, provided a basis for separating the wages paid for train yard inspection between various functions, and was also used to pick up certain portions of such wages charged to Account 402 and elsewhere. There was excluded the portion of such wages assignable to transportation activities.[34] The portion assigned exclusively to making repairs in train yards was separated between home and foreign cars, and ownership and user responsibility as indicated by the study. That portion of inspectors wages assignable to looking for mechanical defects and carding for defects was assigned to ownership expenses on the basis of the costs of the repairs made to such cars, while a portion of miscellaneous inspection work costs was assigned to per diem ownership costs on the basis of the distribution of all other inspection costs in Form 4.

[34] These included such activities as coupling air hoses, testing air, oiling journal boxes, adjusting packing, checking and carding cars for commodity loading, preparing cars for loading, coopering, cleaning, inspecting and adjusting lading, closing side doors, checking for right-of-way clearance, etc.

Payments for foreign cars destroyed, less salvage, were excluded from the ownership cost computation as was also the amount in Account 314 for switching expenses in connection with freight-train car repairs. The latter, which does not cover all switching expenses which are related to repair of cars was replaced by a computation based upon the factor of $49.08 per switching locomotive hour, as developed from Rail Form A, *Formula for Use in Determining Rail Freight Service Costs.*[35] Using special study Form 7-A, a sampling was taken on seven selected days throughout the year 1960 to show the switch engine hours switching bad order cars. The switch engine hours were expanded to a full year and multiplied by the above cost to produce a total cost for switching bad-order cars. This amount was then distributed between per diem and non-per-diem cars on the basis of the number of each switched. Separation of switching costs of per diem bad order cars between ownership and other costs was made on the basis of the costs of repairs done to each. A sample study was made on Form 11 to develop the costs of repacking journal boxes separated between home and foreign cars, and ownership and user responsibility, and the proportions used to distribute to per diem ownership costs the charges for this item in Account 402.

The cost of transporting repair materials to locations where they are to be used is covered by the item of non-revenue freight. By a seven day sample study similar to those described above, the ton-miles applicable to such freight for use in the repair of equipment, shops and enginehouses, was developed and a total cost computed using 1.23 cents per ton mile. The latter figure results from dividing all freight expenses and return on investment of Class I line-haul railroads, other than the portions

[35] Issued by the Cost Section as Statement No. 2-57 in July, 1957, as information. A revised edition was issued in November, 1963, as Statement No. 6-63.

applicable to per diem cars, by the total ton-miles of both revenue and non-revenue freight. A portion was assigned to ownership responsibility repairs on the basis of the distribution of the particular equipment maintenance account involved.

The various facilities used in accomplishing repairs, including shops and enginehouses, shop machinery, power plants; power plant machinery, power transmission systems, work equipment and miscellaneous equipment, were made the subject of special studies, as a result of which, a portion of their costs of maintenance, depreciation, taxes, and interest on investment was assigned to ownership costs of per diem cars. Depreciation was based on original cost and interest on depreciated original cost, using for the latter a rate of 6.62 percent before taxes, equivalent to 4 percent after taxes. Depreciation, taxes and interest are not included in the total of $583,715,117, but are listed as separate cost elements and treated later herein.

B—*Bad Order Switching.*

Account 314 contains some of the costs of switching bad order cars, but not all. In developing the cost of this item, the Cost Section eliminated the amount of $6,673,463 appearing in Account 314, and substituted therefor $91,687,133, which it then separated between per-diem and non-per diem cars on the basis of the number of cars switched.[36] Separation of the per diem car portion between ownership and user costs was then accomplished on the basis of the cost of repairs. The substituted figure was computed by multiplying the total switch engine hours of locomotives engaged in switching bad order cars, developed from the special studies, by $49.08 per hour. Their hourly cost was taken from Rail Form A calculations for

[36] The ratios used were developed from the statistics obtained from the seven day test on Study Form No. 1.

the United States as a whole, and includes all costs, including overheads, related to switching, for both yard and road engines.[37] Southern Railway contends that total switching expense of bad order cars for 1960 does not exceed $84,192,071. This is based upon the assertion that nearly all such switching is accomplished by yard engines, having lower costs of operation than the average of yard and road engine switching. Southern's analysis of this cost uses a percentage of 5.241 obtained by dividing total switching hours of yard locomotives by total hours switching bad order cars. This percentage was then applied to costs of maintenance of equipment and transportation accounts of yard locomotives. Similar allocations of costs of water and fuel stations, shops, and enginehouses were made, and five percent taken of switching maintenance of way expense. Floating equipment expense was eliminated. Allocation of return on cars, shops, etc., was based on either 5.241 percent or the rounded figure of five percent. In distributing the total cost between home and foreign cars, and between ownership and user responsibility, Southern Railway employed the same method as did the Cost Section. When reduced to the cost per active car day, the difference in method used by Southern Railway results in a reduction of slightly over one cent below the repair figure calculated by the Cost Section.

There is no evidence in this proceeding as to the percentage distribution of switching of bad order cars as between road and yard engines. The special studies did not attempt to make this distinction since the Cost Section officials did not believe the refinement would produce significant results. On brief, Southern Railway suggests that further refinement is possible by more accurate determination of the switching hours of all locomotives. It appears not unlikely that the greater part of switching of

[37] Not including, however, such items as loss and damage, traffic, expenses, etc.

bad order cars would be accomplished by yard engines and that the cost may vary somewhat from that indicated by the nationwide average switching cost per hour. Southern Railway's analysis suggests that the actual cost may be somewhat lower when a greater portion is based on the costs of yard engines and that it is feasible to so refine the cost of this item. No party challenged the refinement as calculated. The difference in result, however, is relatively small when reduced to a daily basis and supports the Cost Section's decision to use the nationwide average cost for the purposes of its study.

The analysis made by Southern assumes that all bad order switching was done with yard locomotives. If the suggested refinement is to be accomplished in the development of costs of car ownership, a sample study will be required to determine the extent to which this type of switching is accomplished by yard and road locomotives. The Examiner recommends that, as a basis for future cost studies, a sampling be made and the suggested refinement accomplished. On the present record, however, there is no foundation for a finding as to the extent of departure of precise costs of switching bad order cars from the average costs of all switching. In these circumstances, and in view of the negligible impact on the ultimate daily cost, the average costs used by the Cost Section are found to be the more reliable.

C. *Train Yard Inspection, Etc.*

It is contended that train yard inspection is not conducted for purposes which should be related to per diem costs. The function, it is argued, is primarily concerned with transportation activities on the using line, rather than the determination of repairs related to costs of ownership. It is not denied that one of the purposes of such inspections is to determine whether repairs are needed, or that such repairs, when made, are of a type which frequently

fall within the sphere of ownership responsibility. The Commission has considered this contention on prior occasions, and none of the arguments in this record warrant any conclusion different from that heretofore reached.[38] The contention that no portion of depreciation of repair facilities should be apportioned to work on foreign cars, since such facilities would be maintained in any event to repair home cars, is an application of the marginal cost theory, not customarily accepted by the Commission. The same is true with respect to allocation of the expense of interest on investment in these facilities.

D—*Repair Deficiency.*

Remaining issues with respect to the special studies of 1960, and the resulting Cost Section analysis of repair costs, are concerned primarily with the distribution of costs between home and foreign per diem cars and involve the validity of an amount which, as calculated by the Cost Section, purports to represent the extent by which reimbursement by owners to users for ownership responsibility repairs made by the latter fail to meet the actual cost of such repairs. This is the so-called "repair deficiency."

A great deal of repair work is accomplished on foreign cars by using railroads. Repairs made either by the owner or user necessitated by improper use and handling of the car are not considered ownership responsibility items, and the costs are customarily borne by the railroad responsible. For the purpose of computing car rental charges, ownership repair costs are those made necessary by ordinary

[38] In *Chicago, R. & Q. R. Co. v. New York, S. & H. R. Co.*, 28 I. C. C. 291, 298, the Commission rejected the contention that the cost of inspecting per diem cars to determine the need, if any, for repairs, as well as the cost of inspection to determine the adequacy of repairs made, were not properly includible as maintenance items. The study there mentioned as necessary to separate out transportation expenses has been made. See Footnote No. 31, *supra*.

usage, and the maintenance normally required to keep the car in good operating condition. Interchange Rules of the Association of American Railroads provide specifically for the calculation of the amounts which owners are to reimburse to users for repairs made by the latter.[39] The figures used by the Cost Section in developing the total repair cost include all costs which were assigned as the responsibility of the owners, whether they were accomplished by the owners or by users. Initially the calculation of ownership cost was accomplished upon the assumption that owners had fully reimbursed users, and had thus borne themselves, all the costs of ownership responsibility repairs. Certain respondents contend that the amounts which owners reimburse to users for such repairs, pursuant to the AAR rules, are inadequate, and that the deficiency should be taken into account in calculating the ownership cost and resulting car rental charges. Of the $858,715,117 of total ownership responsibility repairs for the year 1969, as computed by the Cost Section analysis, the distribution produced by the sample studies indicates that $186,482,539 was accomplished by user railroads and that $98,537,020 of this amount was not reimbursed to them by the owners. Distributed over the per diem days paid for by all U. S. railroads in 1969, this amounts to 41.417 cents per day. A number of respondents challenge both the existence and magnitude of this figure.[40]

[39] The charges are actually designed for use of all situations when one railroad accomplishes repairs for which another is responsible.

[40] A restatement of the car repair deficiency by Southern Railway, eliminating about 21 million dollars in inspection costs, about 6.3 million dollars in depreciation and interest on repair facilities, and about 1.2 million dollars in cost of switching bad order cars and lesser related overhead items, produced a figure of $61,188,140. This restatement was offered without prejudice to Southern's position in opposition to employment of the deficiency as an offset in the per diem charge.

From the data obtained on Forms 2, 3, and 4, allocation percentages were developed for wages and materials used in repair of cars which were applied to the total expenditures for the year 1960. Of the reported labor costs in effecting repairs during the test period, some 18.8 percent were assigned to ownership repairs on foreign cars, while about 28.4 percent of material costs were so assigned. In apportioning total expenditures for the year however, the Cost Section applied the combined percentage for these two items, amounting to 25.618 percent, to the total amounts of both wages and materials. This produced a figure of $95,324,715 which constituted over 50 percent of the challenged expense of $186,482,539.

It is contended that application of the combined percentage to the total wages and materials cost for the year produced an excessive allocation to foreign car repair costs of some $7,839,374. Application of the wage and material percentages developed by the sample studies separately to the reported actual wages and materials in Account 314 for the year 1960, however, would not necessarily produce the more reliable result as alleged, since identical units are not involved. The Form 2 study of repair wages was confined to direct freight-train car repair wages which are charged to Account 314. It was restricted to wages paid to employees actually making repairs to freight train cars. Excluded from the study were wages paid to gang foremen, checkers, inspectors, billing repair card write-up men, train inspectors, employees engaged in reconditioning parts, crane operators, employees engaged in making tools and other general shop employees, portions of wages of employees working on mobile repair units, and supervisory employees not actually working on cars. Wages of employees engaged in reconditioning parts were included in the sample study as part of the cost of reconditioned parts installed on cars. The Form 3 material study was confined to materials directly applied to cars and excluded

materials used in reconditioning parts which were not directly applied to cars. Reconditioned parts, when used, were priced at scrap value plus a pro rata of labor, material and shop overhead applicable to reconditioning, including an allowance for freight transportation paid to others and a proportion of store expenses. It is apparent that the detailed separation of various wage and material items, with the assignment of portions of the former to materials cost for the purpose of the study made inappropriate the application of the specific percentages for each to the items of like title appearing in Form 3; and that the intermingling required the application of the combined percentage in assigning the annual cost of both wages and materials to the various categories. Conceivably, studies could have been devised to disclose many of the components in more detail, but there is no basis for concluding that they would have produced results any more accurate.

It is also contended that the Form 2 and 3 studies produced inconsistent results with respect to the relative amounts of wage and material costs, indicating inherent defects which render the sample results unreliable. In connection with this contention, exceptions are renewed to the refusal to receive in evidence five exhibits offered to show details of these amounts.[3] The Form 3 analysis of total actual charges to Account 314 for the year 1930 indicated that wages constituted about 48 percent thereof, and materials about 52 percent. Apportionments produced by the Form 2 and 3 studies were about 28 percent wage costs and 72 percent material costs. The rejected exhibits contained data and calculations showing the ratios of wage to material costs produced by these two studies, and the full year distribution from Form 3 for Account 314, for each of some ninety railroads. Thus, for example, testimony was received that Union Pacific reported on Form 2 the expenditure of some $2[illegible] for labor in

[3] Exhibits R-111, R-[illegible], R-113, R-114, and R-115.

repairing ownership items on foreign cars, and, on Form 3, some $310,133.77 for materials, a ratio of more than one to ten. At the same time, this carrier's Form 5 analysis of Account 314 for the year showed a ratio of about 1 to 1.7.

The analysis of Account 314, as reported by the carriers for each quarter and for the year, 1960, on Form 5, included in total wages, those paid to foremen, inspectors, checkers, clerks and other supervisory personnel applicable to Freight train car repairs made at shops, rip tracks, and mobile repair units, as well as an allowance for vacation and holiday pay. While the total wages necessarily included overtime pay, wages reported in the sample study were limited to straight time rates, whether or not the hours involved were overtime hours. The Form 2 and 3 studies were designed to develop the relative amounts of labor and materials employed as between five categories of activity, i.e., Owner responsibility (home cars), Owner responsibility (foreign cars), User responsibility (home cars), User responsibility (foreign cars), and all other freight train cars (including cabooses, etc.). They were not designed to measure individual fractions of the total yearly wage and material expense. Thus, the fact that, when expanded to a full year, the sample amounts fail to approximate the totals reported on Form 5 has no tendency to impeach their validity.

The comparisons made, and those sought to be made from data in the excluded exhibits, purporting to demonstrate inaccuracy or unreliability of the Form 2, 3, and 4 sample studies, are not persuasive. It is not contended that the individual carriers incorrectly reported the wages and materials on Forms 2 and 3, and the fact that activities on the Union Pacific over the 14 test days were such as to involve the application of materials having a total cost equal to more than ten times the direct wages paid on those days is without significance. Since the ratio of

all carriers was about one to three, it is apparent that the indicated extreme of Union Pacific experience was balanced out by that of other carriers. The sample was not intended to develop proportions for any single carrier. Development of the proportions of *direct* wage and material costs for each of the five categories of interest was accomplished to provide a basis for apportionment of a number of other costs, not reasonably susceptible of direct allocation. Respondents do not challenge this technique of cost analysis. The difference in the components of wage and material costs between Form 5 and the sample studies necessarily produces differences in the ratios as between the wage and material figures. A mere showing of such differences does not warrant a finding that the samples were defective. The cumulation of such examples by consideration of the excluded exhibits would add nothing.

Exhibit R-117 is a three page document containing a tabulation of Forms, 2, 3, and 5, data as reported by some 45 railroads, together with calculations showing, for each railroad, the percentages of reported material cost to labor cost as shown on each form. Exhibits R-311 through R-314 are reproductions of summary tabulations made by the Cost Section of reports of railroads on Forms 2, 3, 4, and 5. Each of the latter consists of 8 to 14 large sheets containing from 12 to 14 columns of data. Each was objected to by various parties on the ground that they had not been exchanged with all participants in advance of the hearing, and on or before the date provided therefor in the special procedure pursuant to which these cases were handled. The objections were sustained.[42]

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[42] Other exhibits which also were not exchanged on or before the dates applicable thereto were admitted, since no party objected. The acquiescence of all parties to these departures from the special procedures provides no precedent for permitting other departures where such acquiescence is lacking.

At the close of the last session of hearings in 1963, the procedure to apply to the further hearings was announced on the record. The renewed hearing were to commence on March 23, 1964, and all parties were to exchange their remaining direct evidence on or before January 6, 1964. By subsequent order of the Commission, the date for exchange of this evidence by all parties was extended to January 27, 1964. Exhibit R-117 was first exchanged with other parties at the time it was offered for identification at the hearing on April 20, 1964. On January 27, 1964, all the data underlying Exhibit R-117 had been available to all parties for well over a year in the files of the Cost Section. No satisfactory explanation was offered for the failure to make the exhibit available to all parties on or before the prescribed exchange date. Rules of special procedure made for the conduct of particular cases are designed to insure equitable treatment of all parties and should not be lightly disregarded. Here, it was expected that all parties would have approximately two months to study the direct testimony, and prepare for cross-examination and rebuttal. The objections to this exhibit were well founded.

At the close of the session of hearings held in the spring of 1964, the procedure to apply to the further hearings was also announced on the record. The renewed hearings were to commence on October 19, 1964, and all parties were to exchange their further rebuttal testimony and exhibits on or before September 21, 1964. By subsequent orders of the Commission, the date for exchange of this evidence was extended to September 28, 1964, and the date for resumption of hearings extended to October 21, 1964. Exhibits R-311 through R-314 were first exchanged with other parties on November 16, 1964, at the time they were offered for identification. The summary statements of which these exhibits were reproductions had been available to all parties for nearly two years. No satisfactory explana-

tion was offered for the failure to make them available to other parties on or before September 27, 1964. The special procedure was not satisfied by notifying parties on September 24, 1964, three days prior to the exchange date, that an attempt would be made to have these documents made part of the record by reference. This was attempted but objections of some parties defeated the proposal.

Notwithstanding the failure to comply with the special rules of procedure, it has been strongly urged, both at the hearing and on brief, that these exhibits should be received in evidence because they constitute summaries of the data received by the Cost Section upon which much of the cost analysis, and in particular the calculation of the repair deficiency, depends.[43] Full and intelligent consideration of the issues by the Commission is impossible, it is argued, unless these documents, and, in fact, all the data and calculations underlying the Cost Section analysis, are made part of the record and available for reference. This argument overlooks the fact that the conflicting interests of many different parties are involved in these cases and that fairness to all requires that all material upon which any one of them relies be brought forth on the record and the opportunity provided to produce, if possible, evidence which rebuts or explains it. All parties have had at least two years during which there was free access to all the material underlying the Cost Section analysis to extract and present anything which they consider benefits their position or aids the Commission. The volume of the record demonstrates that full advantage has been taken of this opportunity. The Cost Section and the Commission's Bureau of Inquiry prepared and presented in evidence all the materials related to the cost analysis which they considered of importance to the Commission in disposing of the issues. To permit last minute flooding of the record

[43] Or, in lieu thereof, it is requested that the Commission take official notice of their contents.

with masses of data with no specification or limit as to its use would invite fishing expeditions and the making of surprise arguments on briefs which opposing parties would have no opportunity to rebut, explain, or answer. As noted above, the only stated purpose for which Exhibits R-311 through R-314 were offered would not warrant the conclusions sought to be drawn therefrom. No convincing reason has been offered why the special rules of procedure should be waived for these exhibits over the duly registered objections of interested parties.

Monthly reports to the Association of American Railroads, by member carriers, for the years 1960 through 1962 indicate that, on the average, about 15 percent of cars awaiting light repairs were foreign per diem cars.[44] The Cost Section studies also indicated that foreign per diem cars in bad order and awaiting repair in 1960 averaged 18.802 percent of all bad order cars awaiting repairs. These figures, it is argued, demonstrate that an allocation of over 25 percent of the wage and material costs to such repairs is excessive. The cited statistics do not, however, provide any reliable indication of the relative numbers of cars actually repaired. The evidence warrants the conclusion that repairs to foreign per diem cars, on which per diem payments are accruing, are more likely to be made, while repairs to home cars can be made as needed. Thus, the cost section studies for the year 1960 indicate that, on an average, foreign per diem cars actually repaired and awaiting switching constituted some 37 percent of all cars in that category. Only rarely are heavy repairs made to foreign per diem cars, and it appears not unreasonable that the percentage of wage and material costs incurred by reason of light repairs to such cars should be less than the percentage of cars repaired.

The allocation in the Cost Section study of wages of car inspectors is also challenged as assigning an excessive por-

[44] AAR Form CS60A.

tion thereof to foreign car ownership costs. The total amount assigned to ownership costs, however, is not contested. The figures developed by the Cost Section studies indicate that it cost $25,687,329 to inspect foreign cars for ownership responsibility items, while the cost to inspect home cars for such items was only $18,058,710. At the same time, the wage and material repair cost for these two groups was $95,324,715 and $199,881,245, respectively. That the samples show more time of inspectors spent in inspecting foreign cars than home cars, although the repairs to the latter may have been much more costly, does not render the analysis of inspection work unreliable. There is no suggestion that the inspectors, in making their reports for the purposes of these studies, failed to report the distribution of their time and activities to the best of their ability, or that the results of that study were not accurately summarized. Foreign per diem cars, as indicated by the Cost Section studies, had a daily average car mileage of 58 miles, while home per diem cars averaged only 32.3 miles, a relationship quite similar to that between the inspection costs. More inspection would necessarily result from the additional interchanges. Substantially more extensive repairs are made to home than to foreign per diem cars and greater expenditures for this purpose result. It does not follow that inspection to determine the need for such repairs, or to ascertain the adequacy of the work accomplished, increases in proportion.[45]

The sample studies of repair costs were intended to separate from all costs, those which should be included in car rental charges because they were properly to be classified as the responsibility of owners. Costs in this

[45] The Cost Section study distributed the costs of car inspectors' inspection work between ownership and user responsibility on the basis of the costs of the ownership and user responsibility repairs made to the cars, and may possibly have understated the inspection expense of the ownership item.

category were subdivided between those incurred in respect to foreign cars and those incurred in respect to home cars. It is significant that the criticisms of these studies are directed to the latter separation. Other than switching, the total amount of ownership costs for both home and foreign cars, as indicated by the samples, is not challenged, yet the decision as to whether a particular repair was or was not an ownership item would appear to require far more judgment than the determination of the classification of the car as home or foreign.

These studies were the subject of extensive planning and review, not only by staff members of the Cost Section, but also by experienced officials of the railroads which conducted the actual sampling. The measurement of economic activities by use of appropriate samples is a customary procedure dictated by necessity where, as here, the volume of activity is large. All the studies in the present case, however, were based upon "judgment" samples, not only as to the stratification of the sample and form of data, but also, in many instances, the reported data itself was a judgment distribution as betwen different functions. Thus, the report of inspectors activities required each inspector to exercise his judgment as to the portion of his time spent on ten different functions, and the test days were chosen on a judgment basis. Forms 2, 3, and 7 were similar. The proportions of costs developed by these samples were used to allocate the actual expenditures for the full year 1960. In recent years there has been a substantial development of random sampling techniques, and the reliability of studies conducted pursuant to appropriately designed samples has been recognized by the Commission. In *Increased Parcel Post Rates*, 1957, 303 I. C. C. 59, 72, the Commission stated that "scientific or random sampling should be substituted for a series of samplings selected on the basis of the judgment of the Department's employ-

ces, no matter how capable the latter may be." See also *Reformation of Rates—Fourth-Class Mail*, (1964) 322 I. C. C. 1. Although so-called "judgment" samplings have been customary in the past, and necessary in the absence of better bases for conclusions, random sampling has the advantage of reliability within predictable limits. This is not available in judgment samples.

Whether scientific or judgment sampling is employed, it, as here, it is intended to ascertain the relative size of the various components of a universe, the methods must be so designed as to isolate into separate strata, for separate sampling, those elements which vary appreciably from others. Total ownership labor and material costs, both home and foreign, indicated by the Form 2, 3, and 4 samples constituted 99.33 percent of all the sampled costs. User responsibility labor and material costs amounted to 0.94 percent on home cars and 0.73 percent on foreign cars. The balance of 12.34 percent was applicable to cars other than per diem cars, and was excluded from further consideration. Some 98 million dollars of the costs assigned to repair of foreign cars are the result of applying to total wage and material costs for 1956, the factor of 2.61% per cent developed from these samples. The major part of this apportionment was derived from the Form 2 and 3 samples, comprised of reports of wages and material costs at about 69 percent of the railroad repair facilities in the United States for each of seven, two-day periods, scattered at about equal intervals throughout the year.[8] While this technique appears adequate to provide a measure of the distribution of costs between total ownership costs and total

[8] At 982 out of a total of 1381 points, including shops and repair tracks, on the total 708 points accounted for about 80% of the car repair payroll. On the remaining 173 points were locations where repair of a single type of car predominated. The rest were small facilities without such characteristics.

user costs, and probably to segregate expenses of per diem cars from those of other cars, it is not certain that it would develop properly the distribution of ownership costs between home and foreign cars.

Heavy repairs are accomplished in shops designed and equipped for this work. Such extensive repairs are rarely made to foreign cars, and the costs of these shops appear assignable in large part to repairs to home cars. The overwhelming majority of repairs to foreign cars are so-called "light" repairs, customarily accomplished at repair tracks or in shops with limited equipment, used primarily for such work. Light repair work on home cars is also generally accomplished at these locations. This type of repair is intimately connected with day to day transportation activities, and is spread fairly evenly over the years' operations. Presumably, it would be reasonably well represented in a sampling such as was done here. Heavy work, however, is scheduled at irregular intervals, as sufficient cars needing such work are gathered, and materials stocked, extra labor employed, etc. It appears that the proportion of costs at heavy repair facilities applicable to home cars would appreciably exceed the proportion developed at light-repair facilities. A sampling which did not adequately develop the amount and relationship of the costs as between these two strata would unduly weight the proportions used to distribute costs between home and foreign cars. Thus, if the sample did not pick up the

proper amount of heavy repair shop costs to develop their true relationship to costs at light repair facilities the result would be an unduly high allocation of total costs to foreign car costs. It cannot be found that the Form 2 and 3 samples produced an accurate measure of the proportions of costs attributable to home and foreign cars, but the evidence raises serious doubt as to the distribution resulting from their use. In the future, if such tests are made, more meaningful results would result from the use of carefully stratified random time samples of wage costs material costs, time of departure, distribution of activity between home, foreign, per diem and non-per diem cars, etc.

While there is room for doubt as to the exact amounts of the car repair deficiency, it is indisputable that there are certain elements of expense which might properly be assigned to the repair of foreign cars by AAR method, for which the AAR rules do not authorize reimbursement. Thus, the cost of inspecting foreign cars in order to ascertain the need for repairs which are owner's responsibility is appropriate for inclusion. Similarly, a proportion of labor costs resulting from so-called non-productive time might well be allotted to the repair costs of such cars. To the extent that such items are estimated as a percentage of labor cost, the same labor cost could be used as the base rather than merely the direct labor cost. The AAR charges do not include these elements nor do they include any allowance for investment in cars, sales taxes on materials, and costs of such as various types of work, personal injuries, stationery or printing.

The recommendation of reasonable compensation to the owner of a freight car for the costs of supplies and maintenance of a car which is not [illegible]

similar to those which exist in the car rental rate itself, and which fostered the present proceedings.

It is contended that by such general application of the repair deficiency the resulting inadequacy of remuneration to lines which accomplish greater repair to foreign cars in relation to car days on line of such cars, as noted above, would have the beneficial effect of discouraging unnecessary repairs. It is suggested that the present construction of the AAR charges for reimbursement omits certain elements of cost in order to produce such a repressive effect. While, as intimated by certain testimony, there may be some tendency on the part of some car inspectors to liberality in noting deficiencies requiring repair, which results in higher levels of repair shop work loads, the evidence does not support any finding to this effect. Whether or not it is the fact, the charges for car rental are not to be determined by the extent of their tendency to enforce the car service rules of the AAR. To the extent that they have an incidental effect of this nature, they accomplish a secondary result. That is not, however, their purpose, nor can the reasonableness of the charges be measured by any such yardstick. It is, indeed, conjectural whether the impact of the car rental charge would be felt at the operational level of car repair with any more force than the asserted deliberate inadequacy of reimbursement of the AAR charges.

The argument is made that allowance of the repair deficiency is essential if equitable treatment is to be given user lines, and that to fail to make such allowance would constitute a taking of their property without due process. It is asserted that, since the total amount for which they were liable in 1960 was $594,541,744, and, since they were not reimbursed for $98,534,020 of ownership repairs made by them, users have, in effect, already paid that much. The failure to deduct it before calculating the per diem charge allegedly requires them to pay it twice. The appeal to justice in this contention loses force, however, upon close scrutiny.

All of the several hundred carriers affected by these rates are users of cars of each other, make repairs on cars of others, and, to the extent that there is a deficiency in the reimbursement for the cost of such repairs, suffer therefrom. The record warrants the conclusion that the impact of the deficiency varies widely from carrier to carrier. Of all these carriers, only four support the contention that the deficiency should be calculated and subtracted from the total ownership costs in determining the car rental charge.[32] None, including these four, have attempted to have the AAR rates for reimbursement revised to eliminate the deficiency. Of the four which support the contention, only one, the Long Island Railroad, appears on this record to suffer from the deficiency. Both the Boston & Maine and the New York, New Haven and Hartford appear to derive substantial benefits from the failure of the AAR rates to include all repair costs. A study of payments and receipts of 18 major railroads in connection with the B&M and the NY, NH&H, indicates that, in 1960, the B&M received a total of $57,848.75, for repairs it made to their cars and paid the same lines $162,117.08 for re-

[32] The Boston & Maine Railroad, New York, New Haven & Hartford Railroad, Long Island Railroad and New Jersey & New York Railroad.

pairs they made to B&M cars. It is apparent that the B&M received the benefit of nearly three times the unreimbursed costs in repair costs on its cars which it did not reimburse. The New Haven in 1960 received $32,716.00 for repairs which it made and paid the same lines $881,913.27. It enjoyed the benefit of repairs to its cars at unreimbursed costs over three times those which it failed to recover under the AAR rates.

It is clear that losses due to the repair deficiency are incurred only to the extent that a line accomplishes more repairs to the cars of another than that other carries out on its cars. Both the B&M and the New Haven are predominantly terminating lines, having available many more foreign cars than needed for their originations, and are able to employ some selectivity in their choice of cars to supply to shippers. They are able to, and apparently do, exercise careful control over the amount of foreign car repair work undertaken. The B&M has a policy of making repairs to foreign cars promptly to put them in condition to pass safely west of the AAR interchange rules. While there is some evidence that certain of the repairs made by other lines to the B&M cars might not have been

considered necessary by that railroad, the record does not warrant a finding that unnecessary repairs are made to any measurable extent. The major originating lines have shipper demands for cars requiring the use of foreign cars which need repairs, not only for safety purposes but also to make them fit to handle the freight. These lines have not the extent of choice in cars to be supplied, and are obliged to make more light repairs than predominately terminating lines.

The Long Island Railroad, having no cars in per diem service, does not enjoy the benefit of the allegedly underpriced repairs. It is however, the only line suffering a loss from this situation which seeks to have it remedied by a reduction in the per diem charges.[55] As computed for 1960, the reduction amounts to 45 cents per day spread over the per diem days paid for by Class I line-haul roads, and about 41 cents per day if spread over the per diem days paid for by all U. S. roads. Figures assembled by 20 railroads for the year 1960 indicate that total payments by them to the Long Island for repairs to their cars were $33,321.19. Assuming the accuracy of the deficiency as calculated by the Cost Section, this would indicate a possible unreimbursed amount, using the average figure, of some $37,575. These railroads had over 400,000 per diem days of their cars on the Long Island. At the average deduction of 41 cents per day this line would receive an offsetting reduction in per diem costs of over $160,000, over four times the indicated loss. The record also shows that the Long Island, like all other railroads, incurs liability for repair of foreign cars which falls into the user class, and which it satisfies by returning the cars to the owners, paying the owners at AAR rates for effecting the

[55] The New Jersey and New York Railroad may occupy a similar position but the record is not clear in this respect. See, however, *New Jersey & N. Y. R. Co. v. Erie R. Co.*, 318 I. C. C. 555, 557.

repairs. It thus obtains certain benefits from the ability to pay for the repairs at the AAR rates instead of making the repairs itself at higher cost. While this class of repair work is not part of ownership costs included in the car rental charges, its existence cannot be ignored in considering the extent to which carriers suffer from the limitations on reimbursement in the AAR rates.[56] The record does not disclose the extent to which benefits were obtained in this manner but it is apparent that even this railroad did not suffer unmitigated inequity from the lack of complete reimbursement for its expenses in repairing foreign cars. The experience of the New Jersey and New York Railroad in this respect is not shown.

It thus appears that none of the railroads, which suffer losses due to the repair deficiency, other than the four above-mentioned, consider the matter material. Those which have taken active part in this proceeding oppose use of the deficiency as a deduction from the per diem rate. The B&M and New Haven, which urge use of the deficiency in this manner, appear to have benefited from the existence of the deficiency, and it is clear that they would experience less favorable repair balances if the AAR rates were increased to the extent necessary to eliminate the apparent deficiency. If, however, the deficiency is deducted from the per diem charge, these lines stand to obtain a further benefit. Since they are per diem debtors, such a reduction, like any other action having the effect of reducing the rate, would lower the net balance payable by lines in this position. The consequence would be that these lines, which have already enjoyed the benefit of having their cars repaired at savings in cost exceeding

[56] For 1960, the Long Island received $7,185.42 from the New York Central for repairs to the latter's cars, but paid that line $13,842.48 for user repairs on its own cars for which the Long Island was responsible. It thus received the benefit of nearly twice the amount of deficiency that it suffered on the repairs it made.

the losses they sustained in making under-cost repairs to other cars, would receive a second benefit from deducting the deficiency from their per diem bills. The other lines, on the other hand, would suffer a double loss. This is not equity. It cannot be found that failure to deduct the alleged repair deficiency from the per diem charge would result in a taking of property without due process from the parties seeking this relief.

Upon all the evidence, it is found that the car repair deficiency, to the extent that it actually exists, should be corrected by adjustment in the AAR billing rates, and that any attempt to compensate for the deficiency by a deduction from the car rental charge would be unreasonable.

Car repair costs and associated maintenance expenses, as developed by the 1960 Cost Section studies and analysis have, for the purposes of this report, been grouped in the following list.

| | | |
|---|---|---|
| 1. | Freight-train car repairs including allocation of inspection costs, non-revenue freight, overheads, maintenance of shops, power plants, work equipment, miscellaneous equipment, and switching bad order cars | $583,715,117 |
| 2. | Depreciation on freight-train car repair facilities computed on undepreciated original cost | $ 8,023,021 |
| 3. | Property taxes on car repair facilities | $ 3,824,341 |
| 4. | Payroll taxes | $ 28,140,156 |
| 5. | Return on investment in freight-train car repair facilities computed at 4% (after income taxes) on depreciated original cost | $ 11,489,897 |
| 6. | Return on working capital | $ 2,896,316 |
| | Total | $638,098,858 |

This total cost, divided by the 1,641,200 average number of per diem freight train cars in service in 1960 produces an average repair and maintenance cost per car of $388.80. The latter figure, divided by 306 per diem payable days results in an average daily cost of $1.27. No dispute exists with respect to the amounts assigned to payroll taxes, property taxes on repair facilities, and return on working capital. Contentions regarding the use of reproduction costs and higher rates of interest with respect to depreciation and interest on investment in repair facilities are considered later herein. The Examiner finds that the ownership costs developed by the Cost Section studies, apportionments, and analysis, for maintenance and repair of freight cars and associated facilities for 1960, are as accurate as could reasonably be obtained and fairly represent the costs for the period covered.

## IV—Ownership Capital Costs

### A—*Investment Base.*

Ownership costs, other than repair and maintenance costs, include the costs related to the acquisition of cars and the property taxes thereon.[57] Compensation to the owner for the burden which is assumed in purchasing or building the car has customarily been calculated, on an annual basis, by including an amount representing the depreciation charges for one year and an amount representing an interest return on the depreciated balance of

[57] While doubts have been expressed in the past, there appears to be no current controversy regarding the method used to estimate property taxes on freight cars. These are so varied from state to state as to make precise measurement impracticable. The amount is estimated by both the AAR and the Cost Section by use of a factor developed by taking a ratio of all property taxes to total investment, which is applied to the investment in freight cars. The factors for recent years have been as follows: 1948—0.977, 1950—1.005, 1952—0.976, 1958—1.123, 1960—1.163, 1961—1.083.

the cost. The calculations underlying the AAR rates prior to 1953 used the average original cost of the cars as the base for depreciation; thereafter the base employed was the average original cost adjusted by an index designed to produce what has been called reproduction cost. Straight line method of depreciation has been used, at the average of rates used by carriers and authorized by the Commission, approximately 3.0 percent, except that in calculating the multi-level rates a flat three percent was used instead of the 3.06 percent average. Beginning with the studies underlying the $1.50 rate, in 1947, the base used to compute interest was the average of depreciated original cost and depreciated reproduction cost of the average car in the fleet. Studies underlying the $2.75 and later rates used depreciated reproduction cost as the base. In all instances, interest was computed at six percent before taxes.[58]

The analysis prepared by the Cost Section in these proceedings used original cost as the base for depreciation and depreciated original cost as the base for interest charges. Straight line depreciation was used at a rate of 3.32 percent.[59] Interest at a rate of 6.62 percent before taxes, equivalent to 4 percent after taxes, was allowed on the depreciated original cost. The Cost Section calculated the depreciation charge on freight cars for 1960 at $197,060,088, to which it added $17,594,870 representing the depreciation which would have accrued on cars still in service but was not reported since they had been fully depreciated in the past.

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[58] This discussion is concerned solely with respect to freight cars. Depreciation and interest charges on investments in car repair facilities are considered subsequently.

[59] Salvage value was taken at 17 percent, and service value to be depreciated at 83 percent. Division of the latter by the assumed 25 years service life produces a rate of 3.32 percent.

The use of this traditional method of measuring this element of ownership burden gives rise to certain issues upon which the parties are irreconciliably opposed. Certain of the respondents, particularly those who are also defendants in Docket 31358, support the use of original cost as the base for both the depreciation charge and interest return. A number of respondents, primarily composed of the complainants in Docket No. 31358, support the use of reproduction cost for both purposes. The former group urges the use of an interest rate no greater than employed by the Cost Section, and preferably lower, while the latter group seeks the use of an interest rate of six percent after taxes, or higher. Southern Railway urges the use of original cost as a basis but would apply a 14 year service life for depreciation purposes, using a double declining balance method, and allowing interest of 8 percent before taxes. As an aid to the consideration of these issues, the Cost Section calculations include alternative amounts reflecting the use of reproduction cost as a base.

Railroads which buy or build cars today face a problem caused, in large part, by the radical change in the character and cost of railroad freight cars which has occurred in the past twenty years. A gradual increase in the cost of producing standard cars would not by itself have produced so pressing a problem, so long as freight cars, on the average, were of a few general types and cost about the same to build and maintain. Such had been the situation for many years prior to World War II and, while increasing costs resulted in increasing the car rental rate up to the one dollar per day which it reached in 1920, and at which it remained until 1945, there had appeared no radical variances in the average costs of cars in the fleet. This condition underwent a substantial change after 1945.[60]

[60] Between 1915 and 1945 the Bureau of Valuation cost index for Account 53, Freight Train Cars, rose 154 points, an average of about five points per year. Between 1945 and 1960 the increase was 365 points, or nearly 25 points per year.

The problem of rapidly increasing costs has been augmented by the development of special types of cars, and special features for the protection of freight which, together with the trend to larger cars, has produced appreciable disparities between the cost basis of the existing fleet and that of the fleet of the future. In part, the problem is transitional, with old and cheaper cars still composing the major part of the fleet and having great influence, prior to 1964, on the measure of the per diem charge. It is apparent, however, that for the foreseeable future, wide disparities in the costs of various types of cars will continue to prevail, and the general similarity in the cost of freight cars which, prior to 1940, permitted the application of a uniform rental charge, cannot be expected. Since the ownership of most carriers varies as between types and numbers of cars, employment of a uniform charge, which averages the costs of all cars, cannot be expected to compensate them for their particular investments. Some graduation of rental charges appears unavoidable. A step in this direction was taken on January 1, 1964, when the multi-level scale of charges, based on car costs was instituted.[61]

Certain respondents contend that rates varying with car cost cannot be approved or prescribed due to the lack of reliable information as to the extent such cars vary in their repair cost experience and annual utilization. It is argued that the new, high-cost cars receive much greater use than the older cars, and should have their higher costs spread over a greater number of active days than the average of all cars. The increasingly higher investments required to acquire new freight cars in recent years, however, makes it

[61] Special provisions existed prior thereto applicable to certain cars. Thus additional loading surcharges were applied to the use of particularly expensive, heavy duty cars. Such arrangements may not be necessary with the use of a multi-level rate system based on car value but the record does not warrant a finding on this point.

necessary to apply varying rates in order to approximate the burden undertaken by owners of such cars. While some evidence indicates that the newer cars spend more time off line than old cars, and perhaps incur a greater number of per diem payable days by foreign lines, it does not support any finding that their overall utilization, both on and off line, is measurably different. It was not shown that any workable separation can be made between cars on the basis of value, which relates to utilization.[62] No studies were made with respect to this alleged distinction in the car day divisor and no basis exists for finding the average divisor inapplicable to cars in all value brackets.

A similar conclusion is required with respect to costs of repair and maintenance. If a significant difference exists, the age of the car appears to provide a more certain measure than the depreciated value currently assigned to the car. It cannot be found on this record, however, that any measurable progression in repair costs exists in relation to either the age or depreciated value of the car. Nor can it be found that the difference, if any, between the average repair cost and the actual repair cost of new or old cars, is so great as to make unreasonable the results reached by use of the average.

Certain evidence, developed in connection with the study of per diem payable days, suggests that car utilization, and perhaps repair costs as well, vary more reliably in relation to the type of car in use. Thus, line haul mileage per active car day, and per diem payable day, for TOFC cars

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[62] The difference, if any exists, appears to be more related to the age of the car than to its depreciated value. Some testimony suggests that very old box cars, the so-called "work-horses" of the fleet, may be held aside from general use normally but employed in cases of shortage or periods of high activity. Such practices would affect the car day divisor applicable to such cars but the record does not support a finding in this respect. It is also suggested that the newer cars have a higher car-mile utilization.

appears greater than for other per diem cars. At the same time, however, this added use apparently results in higher repair costs for such cars which would offset to some extent the benefit of the greater utilization. Whether the net result would vary appreciably from that produced by use of average figures is conjectural. The Commission would not be warranted in disapproving rates varying with car cost merely because of the asserted possible differences in utilization and repair costs.[63] Appropriately designed scientific samples should be taken of both elements, however, to determine whether significant differences actually exist. If they do, separate calculations taking them into account would be indicated for future years.[64] That a more complicated process would result should not be a deterrent to equitable calculation and distribution of the ownership burden. The importance of simplicity in fact and appearance which prevailed in the past in connection with calculating per diem charges has largely disappeared with the advent of machine processing of data.[65]

Certain of the predominately terminating lines express a fear that in times of car surplus, originating lines will tend to employ the higher cost cars, regardless of the

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[63] In dealing with commercial matters, solutions which accomplish substantially fair results within a reasonable time may well produce more real justice than long delayed searches for minute accuracies.

[64] The car day divisor is an item of such importance in the development of unit costs that its calculation annually is imperative. The added effort necessary in taking sufficient periodic samplings to permit reasonably accurate estimates of active car days, surplus car days, and bad order car days, is justified by the importance of equitable distribution of the ownership costs.

[65] There is, of course, a practical limit to the extent of subdivision of rates. The ability of properly programmed computers to assimilate and apply a myriad of such factors is probably unlimited, but of more importance is the judgment of responsible officials as to the value of adding such factors.

freight revenue to be derived from the lading. Without doubt it would be possible to abuse the use of multi-level rates in this fashion but it cannot be found on the present record that such will occur.

The increasing interest in the use of reproduction cost as a base for calculation of the depreciation and interest on investment elements of per diem costs has paralleled the increasing cost of replacing cars since World War II. In prior years the more significant factor in the development of car rental rates was the repair and maintenance cost, since this, like the car day divisor, fluctuated more noticeably than did the cost of replacing cars. It also represented, proportionately, a greater part of the total costs. The marked increase in the capital outlay necessary to acquire replacement cars in recent years brought to the front the need to more accurately assess and provide for compensation for this element of the ownership burden. With the value of the average car largely influenced by the great number of old cars, use of reproduction cost as a base for calculation of depreciation and interest represented an attempt to provide compensation for higher capital costs of new cars.[66] In *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I. C. C. 383, and in the first report in Docket No. 31358, *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I. C. C. 291, the Commission approved the use of this base. With the institution of the multi-level rates, designed to meet the ownership burden for cars in separate cost categories, however, the problem caused by the single average rate has disappeared. As users employ cars in the various value brackets, paying rental charges measured by their particular capital costs, they will neces-

[66] It cannot be overlooked, however, that the fleets of most car owners were comprised of both old and new cars. While indeterminate in extent, the inadequacy of the single rates to cover costs of the new cars was, at least in part, balanced by overcompensation on the older cars.

sarily be returning to the owners an appropriate proportion of the ownership burden generated by those cars. Use of the reproduction cost base can no longer be justified on this basis.

For many years there has been a continuing decline in the purchasing power of the dollars used to acquire cars, due to a continuing increase in the wages and cost of materials used in their construction. Many more dollars would be required to reproduce today a car originally built in the 1940's, and a car owner, receiving payments from car users in dollars of current purchasing power, does not receive the same relative contribution to the cost of the car as it made at the time of purchase. Had each user of the car been the original purchaser, it would be subject to the same erosion of the purchasing power of the dollars used, and may reasonably be expected to bear a share of that erosion. The use of reproduction cost as a base attempts to translate into dollars of today's value, the number of higher value dollars expended to buy the car, and to spread the impact of inflation over all users, including the owner. In principle, equating the per diem dollars contributed by users to dollars actually expended by the owner, by means of an appropriately constructed index, appears essential to fair compensation. Thus, to the extent that the car rental charge is comprised of a return of actual funds invested, whether measured by depreciation charges or otherwise, the contribution of users to the cost may be measured in dollars of purchasing power equivalent to those expended. It does not follow, however, that the blanket application of such an index to the original cost of the car may fairly be employed to expand any other element of the ownership burden.

Proponents of the reproduction cost basis point out the substantial increases in the cost of cars now being constructed, and stress that users of per diem cars should contribute to the extra cost of the car which will have to be pur-

chased to replace the car currently in use. In recent years the total number of freight cars in the national per diem fleet has decreased, although generally the carrying capacity per car has increased. Cars now being constructed are larger, more expensive, and have more modern and intricate equipment than the cars they replace. The improvement in their carrying capacity is multiplied by improvements in roadbeds, rails, engines, and operating practices. Generally, however, these latter factors are contributed by all using railroads and constitute a proportional contribution to the increased revenue producing capabilities of the new cars. So long as the contribution of users is measured by the costs of the car actually used, it cannot be denied that the higher costs will be rateably borne when the new car is put into use. It is contended, however, that unless car users also contribute in advance to the extra cost of the expected replacement cars, the entire risk of the investment will fall upon particular carriers, with a concomitant depressant effect on the incentive to undertake such investments. It is argued that the owner must take the risk of variations in the amount of use given the new car, by itself or other carriers; a risk associated with the level of economic activity and volume of traffic demand. A further risk, although one concededly not susceptible of measurement, is said to be the loss due to the unavailability of the car when needed by the owner, due to its being off line. These various factors, it is argued, should be included as appropriate elements of the cost of car ownership, to which users should contribute, and may be taken into account, at least in part, by use of reproduction cost as a base for interest on the depreciated balance of the cost.

Without doubt, a car rental rate which is inadequate to compensate owners for the use of their cars tends to dampen interest in the expansion of the fleets of individual carriers. The compensation which may be established by the Commission, pursuant to the provisions of Section

1 (14)(a) of the Act, must be reasonable, however, and cannot be based on conjecture. It cannot be found on this record that car owners actually incur measurable losses due to the failure to have new cars on their lines at particular times to meet traffic demands. Assuming, however, that situations do occur wherein opportunities to obtain and move freight are lost because the cars on line are insufficient in number, or in location, it does not follow that a contribution should be exacted from all car users to make the owner whole. Cars move off the owners' lines in interchange service when placed for such movements by the owner. All lines participating in the movement, including the owner, earn revenue from it.[67] The element of compensation here proposed is analogous to damages for tort, but, if the car is returned in reasonable course of time, then its availability to the owner in the interim is not the fault of any party to the movement. If the car is unreasonably delayed in its return, to the extent of violation of the car service rules, the matter is one to be handled as it arises by procedures apart from the car rental rates.

Assuming that a car owner has paid for the car with its own funds, and recovers each year a portion of its investment through inclusion of the depreciation charge, the inclusion of an interest return on the unrecovered portion of the investment is designed to compensate for the interest which might have been earned on that amount in an equivalent alternate investment. No reason appears why that amount should be inflated with the passage of time by application of an index purporting to represent the increased cost of building or buying freight cars. There is no basis in this record for a finding that possible alternate investments would have undergone such appreciation, or any appreciation, or if they had, that the owners

[67] The value of the on-line use of the car to the owner is not a factor to be measured in determining the ownership burden.

would have taken such advantage of it as to convert the amount into a higher figure upon which the same interest return would be computed. Interest on alternate investments would normally be received annually in the same general fashion as per diem payments, and thus undergo the same reduction in purchasing power.

The compensation to which owners are entitled is for the car being used, not for the use of some better car which may be built in the future.[68] That changes in technology, design, size, and equipment, may make the subsequently acquired cars even more expensive is not improbable. The record demonstrates, however, that railroads do not make car for car replacements, nor do they set aside car rental receipts for the purpose of replacing existing cars. Whether replacement will be made by any particular carrier, the extent to which new cars will duplicate their predecessors, and more particularly, the extra cost of the replacement fleet due to such of the above-mentioned factors as may be effectuated makes advance estimation of the extra cost mere conjecture. It cannot be found that the increased interest return resulting from inflating the base by use of the reproduction cost index would have any rational relation to the amount of such additional cost.

Inasmuch as owners of cars can expect to be compensated, under the multi-level rate system, for their cost as they are used, the only argument for the advance payment of the extra cost of such cars is the effect on the incentive of carriers to invest in them. In the light of the evidence presented in these proceedings, this contention is not persuasive. It is generally conceded that railroads in this country do not purchase or build freight cars for the purpose of renting them to other carriers. The undertaking to pledge credit or commit present funds to the acquisition of revenue producing equipment is one faced by all enter-

[68] Section 1(14)(a) appears to permit no other conclusion.

prises. While it is true that the car owner engaging in a replacement program must incur, in the first instance, the burden of responsibility for the expenditures, which is not shared by the users, this condition inheres in the nature of the enterprise. Recompense for this burden is an element of profit, not cost, and should stem from the profits of the enterprise, derived from the revenue producing activity of the freight car.[69] It should not be sought from the joint users of the car whose duty, by definition and long accepted practice, is to bear their share of the costs. No reason appears why a user should contribute to the extra cost of a replacement car which may or may not be acquired in the future, and which it may never use, or, if it does use such car, then pay a rental charge based upon the same increased cost. The proposal is speculative, not susceptible of reasonable ascertainment, and would produce additional problems, equally conjectural in nature.[70]

Another ownership risk, for which compensation is sought by inflation of the interest return base, is that associated with premature obsolescence due to traffic changes or technological progress, and that associated with reduced economic activity resulting in lack of revenue producing employment for the car. This risk, however, is already borne by all users, due to the manner in which the ownership cost is distributed. The car day divisor excludes a

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[69] Some contribution by users appears in the allowance of interest on the funds actually expended by the owner to acquire the car. See *Charges for Protective Service to Perishable Freight*, 215 I. C. C. 684, 690.

[70] If users of present cars are required to pay more than is needed to meet the ownership burden on those cars, on the theory that they should contribute to the extra costs of a replacement car, it is apparent that, having contributed a portion of the investment in the new car, they should not be required to pay the owner an interest return thereon.

large percentage of home surplus and bad order cars, on owners' lines, while the dividend includes the costs of all cars.[71] The quotient is thus enlarged so as to spread over all days of active cars, a rateable portion of the costs of cars for which current employment is not available or feasible. Owners having home cars on line, not in use by reason of the above-mentioned risks, receive in the daily car rental payments for cars in active use a share of the costs of the idle cars.

Expenses of repairs and maintenance, and property taxes on freight cars are incurred annually, in dollars of substantially equivalent purchasing power as those received annually from users as contribution thereto pursuant to the prevailing car rental charges. The Examiner finds that no justification whatsoever has been shown for enlarging the base upon which interest on investment is computed and that the unreturned balance of the owner's original expenditure should be used therefor. Application of an appropriate index reflecting the loss in purchasing power of the dollar to that portion of the ownership burden represented by the actual cash outlay of the owner is found to be proper in order to equitably share the impact of such changes.[72]

Included in ownership cost is an allocation of a portion of charges for depreciation and interest on repair facilities, including shops, enginehouses, powerplants, etc. It has been customary, and the Commission in its prior report in Docket 31358 approved the use of original cost as a base for calculation of depreciation on these facilities. The

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[71] Thus, in 1960, the per diem payable days excluded 86.5 percent of the home surplus and bad order cars, thus spreading their costs over the lesser number of cars in use, at a higher cost per car day.

[72] In effect, the car should earn each year a share of its cost, measured in dollars which would buy that same share of the car as did the dollars originally spent.

depreciation rates vary, due to the substantially longer life of the facilities and variances in their character. No issues have been raised with respect to this charge. Interest on the depreciated investment in repair facilities has been computed, in recent years, upon a depreciated reproduction cost base, also approved in the last report. The discussion above, with reference to the interest base for freight cars, is equally applicable to these facilities. When reduced to an amount per car day, the figure is relatively small. Nonetheless, no justification has been shown for enlarging the dollar value of the investment in repair shops, etc., by application of the index of freight-car construction costs. The connection is, if possible, even more remote than that enjoyed by freight cars.

The cost index employed in the development of reconstruction costs by the AAR is challenged by the Boston & Maine and New Haven as including the costs of a number of improvements to particular parts of the car, and thus not truly representative of the cost in current dollars of reproducing the car as originally built. This index is the product of a joint effort with the Commission's Bureau of Accounts, Section of Valuation,[73] and is one of several established after analysis of major construction contracts, reports by carriers, and information furnished by equipment suppliers and manufacturers. Some 44 separate indices are published by the Section of Valuation to correspond with specific primary accounts of railroads, as listed in the Uniform System of Accounts for Railroad Companies. The index involved herein is that published for Account No. 53, Freight-train cars. It purports to show the relationship of prices for each year subsequent to 1914, using the prices in the 1910-1914 period as 100. The index for each year is a composite figure based upon the percentage of each type of car and equipment in the account.

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[73] *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I. C. C. 383, 403.

While the record contains little by way of detail as to the construction of this index, the testimony of a former Director of the Commission's Bureau of Transport Economics and Statistics that, although extras are omitted, items such as wide doors, greater length, bigger volume, steel roller bearings, cushioned underframe, etc., which are an integral part of new cars, are included in the average costs which underlie the index, was not contradicted.[74] If this index is employed to measure the loss in purchasing power of money, it should reflect only the increased cost of building the precise car in which the funds were originally invested. It is not important that no carrier would actually reproduce such a car; the goal is to measure the cost of reproduction in order to estimate the contribution in present dollars necessary to equate the dollars actually invested in that car. To the extent that the index is inflated by the current cost of improvements and design advances, not a part of the original car under consideration, its reliability as a measure of inflation is diminished.

Attention is called to the wholesale and consumer price indices developed by the Department of Labor, Bureau of Labor Statistics, and published in the 1964 Statistical Abstract. These indices were not introduced in evidence but, on brief, official notice thereof was requested. Such notice is permissible and will be taken.[75] See *Missouri*

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[74] It is argued that other improvements which form integral parts of new cars include such items as improved metallurgical design of wheels, self-aligning trucks with one-piece cast steel bolsters, case steel side frames with integral journal boxes, stabilizing devices, snubbing features built into side frames, wear plates in critical wear areas, journal roller bearings, improved coupler design and draft gear design advances.

[75] In view of the conclusions reached herein, the Examiner is of the opinion that no party has been prejudiced by this action. Attention is called, however, to Section 7(d) of the Administrative Procedure Act, 5 U. S. C. §1006.

*Pac. R. R. Reorganization,* 282 I. C. C. 629, 643; *Increased Freight Rates,* 1951, 284 I. C. C. 589, 596. Reduced to a common base, using the 1920 to 1939 period as 100, it is shown that the Account 53 freight car index rose from 118 to 346 between 1940 and 1961, the consumer price index rose from 88.22 to 188.39, and the wholesale index from 86.99 to 202.91. From 1961 to 1963, the freight car index remained at 346, the consumer index rose to 192.91, and the wholesale index rose to 213.52, then dropped back to 202.91. The freight car index thus rose about 350 percent, the consumer index, about 218 percent, and the wholesale index, about 233 percent. Although the overall average of wholesale and consumer prices did not rise to the same extent as freight car prices, the former are composite figures covering a great number of commodities, and the comparison is inadequate to support any finding as to the extent by which the latter may be excessive.

For many years, the Joint Equipment Committee of the AAR has issued annually a report on costs of railroad equipment and machinery which has included, inter alia, the same price index for Account No. 53 as the publication of the Section of Valuation, as well as statistics on the delivered cost of freight cars and other equipment for the current year. Pursuant to Freight Car Rule 112 (Section B) of the AAR Code of Rules for the Interchange of Traffic, this index and data are employed by railroads in specified instances to calculate the payment to be made for destroyed cars.[76] For the present, the Account 53 index

[76] Paragraph No. 3 of this rule provides "Where per pound settlement prices are not provided and the rules specify settlement on reproduction cost basis, cost of reproduction in kind at date of destruction shall be obtained by adjusting the original cost to date by the relation of costs as between those in the year built and in year prior to date destroyed, on basis of percentages of costs as issued by Joint Equipment Committee—Costs of Railroad Equipment and Machinery—published by the AAR Finance, Accounting, Taxation and Valuation Department, Washington, D. C. . . ."

must be accepted as the best available evidence of the increased cost of constructing freight cars, with the recognition that it is, to some indeterminate extent, inflated by reason of the inclusion of factors mentioned above. For the future, it would appear advisable to determine whether there is, in fact, a need to seek further refinement of this index, so as to reflect, so far as practicable, the change in cost of constructing the same cars, and to eliminate the costs of improvements not used on the base year cars.

B—*Interest Rate.*

The amount which an owner receives to compensate for the use of funds which it has invested in the freight car depends both upon the magnitude of the base and the interest rate applied to it. Certain respondents urge that the rate should be not less than 6 percent after tax, based upon depreciated reproduction cost. Southern Railway, while advocating use of the depreciated original cost base, seeks an interest rate of 8 percent before taxes. The AAR staff has regularly employed an interest rate of 6 percent before taxes based, in recent years, on depreciated reproduction cost. The Cost Section analysis followed Rail Form A, and computed interest at a rate of 4 percent after tax, equivalent to about 6.62 percent before tax, based upon depreciated original cost. The defendants in Docket 31358 assert that the latter amount is the highest that can fairly be allowed.

In both the 1949 and 1955 decisions, the Commission held that a return of 6 percent before tax based on depreciated reproduction cost would be proper. Apparently this conclusion, as noted above, was influenced by the view that the single average rate, based on the preponderance of older cars, failed to meet the capital requirements involved in replacing the fleet with modern cars.[77] With the advent

[77] Cf. *Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co.*, 297 I. C. C. 291, 302. See footnote No. 66.

of multi-level rates there is no necessity for use of this device to compensate car owners and no persuasive reason has been offered for inflating the investment base in this fashion. In lieu of inflating the base, however, there arises the demand for a higher interest rate, having the same result. The same arguments with respect to risks of the entrepreneur are made in support of higher interest rates as were employed with respect to inflation of the rate base. When these entrepreneurial risks are reduced to specifics, however, they are shown to be shared by all users as a result of the manner in which the total costs of all cars are spread over the payments made for cars in active use.

Compensation for having exercised the initiative and pledged the credit necessary to purchase or build the car should come from the profits of the operation, the source of which is the income from freight rates, not the balance of payments arising from car rental charges. A fundamental distinction exists between the fair return on investment which should be received from customers of the railroad, through the freight rates, and the amount of interest on investment which should be contributed by the various users involved in performing the transportation service. The considerations which support the use of the present value of the assets devoted to the service by the owner as a base for charges to the former are not applicable. They do not contemplate the mutual sharing of costs.

Certain respondents point to reported earnings of between 8 and 9 percent before taxes of some private car line companies and suggest that these provide a persuasive guide to the interest rate which should be allowed. The data with respect to these companies is indefinite, due to their freedom to follow varied accounting practices, but it is conceded that the reported return includes the profit from operations. This is not an element which car users may be required to pay. No evidence, other than the unsupported opinion of some witnesses, was offered to support

the suggested return of 6 percent after taxes based on depreciated reproduction cost. The return of 6.62 percent before tax used by the Cost Section, and based on depreciated original cost compares with the return in 1960 earned by railroads from freight service of 5.36 percent before tax, 4.5 percent after tax, based on the depreciated cost of road and equipment. No reason appears why car users, not required to contribute to profits, should pay a higher rate of interest on investment than customers of the service who necessarily are the source of profits. It is significant that in the analagous situation of reciprocal switching charges, the Commission has held that the charges should be based upon actual cost. *Switching at Richmond, Va.*, 245 I. C. C. 293, 298. In recent cases it has been held that interest on original cost at 4 percent after taxes was adequate to provide a fair return for a service of this mutual nature, and that a return of 6 percent was unduly high. *Switching Charges at Detroit, Mich.*, 301 I. C. C. 75, 82; *Routing Cancellation at Waterloo, Iowa*, 302 I. C. C. 477, 485. The rate of interest employed in the Cost Section analysis is found to be reasonable and adequate to compensate car owners for all elements of cost which should be shared by car users.

C—*Measurement of Investment Costs.*

Since the car owner is to be made whole for the financial burden it incurs and the car user is to bear the same financial burden it would incur if it owned the car, some rational measure of this burden must be established. No reason appears why it must be measured by use of accounting devices customarily employed for the maintenance of corporate records. The car should earn for the owner each year a portion of the capital expended for its purchase, together with interest on the unreturned balance, as well as funds necessary to make payments of principal and interest on any amount borrowed to finance the purchase.

The use of an annual depreciation charge plus an allowance for interest on the depreciated balance of the cost does not provide a reliable measure of the needed amount under the circumstances present in this case. These criteria, specified in the McCrea Commission report in 1909, were undoubtedly adequate to measure capital costs at that time. In 1907 the average car cost was $721.96. The range of car costs at that time was approximately $1,200, from about $378 for the cheapest to about $1,602 for the most expensive. Today the range is closer to $35,000, or more. The 1907 ratio between the cheapest and most expensive cars in the fleet was about 1 to 4 compared to about 1 to 15 in 1960. A more precise measure of capital costs is necessary under present conditions.

The evidence requires the finding that few carriers finance the entire cost of purchase or construction of new cars out of retained funds. Commonly the larger part of the needed amounts is obtained through loans secured by equipment trusts or conditional purchase agreements. Not infrequently, the term for repayment of principal is 15 years, with interest on the unpaid balance varying between 2 and 6 percent.[78] While the actual portion of the cost borne by the owner in the first instance varies widely, the most common is twenty percent. The Cost Section analysis developed that approximately 37 percent of the depreciated investment in freight cars, in 1960, based upon original cost, was represented by their outstanding equipment obligations. Data reported in the special studies indicated an average interest rate of 3.849 percent. Tables 1 and 2, below, indicate that where recovery of capital cost is spread over a 15 year period, costs produced by use of charges to depreciation and interest on the depreciated cost (Table 2) greatly exceed those which reflect the impact of financing 80 percent of the cost. (Table 1). Per diem

[78] Rates of about 4½ percent are said to be obtainable currently.

rates designed to reflect costs based upon Table 2 would require excessive payments by users to the extent that the actual burden was more accurately represented by Table 1. A similar comparison appears in Tables 3 and 4, where the recovery of capital cost is spread over a 30 year period.[79]

Where an owner finances the larger portion of the cost of new cars by borrowings which must be repaid, with interest, within a specified period of time, such as 15 years, reasonable compensation for proportional use of the cars by other carriers should be measured by the same term of years. Users, undertaking the same burden would have to repay in that period, and, in principle, should contribute on the same basis. Return of the owner's capital actually invested should reasonably be accomplished within the same period. Similarly, in those instances where an owner has provided, from its own funds, the full cost of new cars, there are persuasive reasons why the same period for return of capital should be employed. The time required to recover the capital invested in a piece of revenue producing equipment is of great significance in the financial planning of any enterprise. The longer this time span, the more conjectural the prospects for return and the more speculative the investment. The long-recognized propriety of a return of 6 percent on investments contemplates a recovery of the invested amount in less than 17 years.

As a guide to the extent of the burden assumed by car owners, there are set forth below, two tables showing, for each $1,000 of investment, the annual cost over a 15-year period. Table 1 assumes a 20 percent payment by the

[79] When consideration is given to the cost to the owner of carrying for the additional 15 years, the difference between payments indicated for a 15 year spread and for a 30 year spread, i.e., comparing tables 2 and 3, and, 1 and 4, Table 3 is shown to indicate rates slightly higher than required and Table 4, rates slightly lower than necessary, but the difference does not affect the principle.

owner and shows the annual charges for payments of principal on the borrowed amount, interest charges thereon at 4.5 percent, a proportionate return of the owner's cash payment and interest at 6.62 percent on the unreturned balance of the down payment. Table 2 assumes payment by the owner of the full cost of the car, with return of principal and interest on the balance, also at 6.62 percent, to be received in a similar 15 year period.[80] Each table allows ten percent of the original cost as salvage value and property taxes have been estimated at 1.163 percent of the mid-year value of the car, assuming a straight line method of depreciation over a 15 year period. In order to approximate the reduction in purchasing power of the funds received annually as contribution to return of principal, an increasing cost index progression of four points per year has been assumed. This is slightly less than the average indicated by the Section of Valuation index over the 15 year period from 1948 through 1962.[81]

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[80] Table 2 also indicates the approximate results of calculating an annual charge to depreciation, adjusted for reproduction costs, and allowance of interest on the depreciated original cost.

[81] These tables, and particularly these estimated cost indices are designed only to provide an indication of the method and approximate pattern of reimbursement per $1,000 of original cost to which owners may be entitled. Actual figures will require regular study and revision, as hereinafter discussed.

## TABLE 1

### APPROXIMATE ANNUAL COST PER $1,000 OF INVESTMENT

| Car Age | Loan $800.00 | | Cash $200.00 | | | | | | Five Year Averages |
|---|---|---|---|---|---|---|---|---|---|
| | Princ. | Int.[1] | Princ.[2] | Index [3] | Adj. Princ. | Int.[4] | Taxes [5] | Total | |
| 1 | $53.33 | $34.80 | $6.66 | 1.00 | $ 6.66 | $13.02 | $11.28 | $119.09 | |
| 2 | 53.33 | 32.40 | 6.66 | 1.04 | 6.93 | 12.58 | 10.58 | 115.82 | |
| 3 | 53.33 | 30.00 | 6.66 | 1.08 | 7.19 | 12.14 | 9.89 | 112.55 | $112.55 |
| 4 | 53.33 | 27.60 | 6.66 | 1.12 | 7.45 | 11.70 | 9.19 | 109.27 | |
| 5 | 53.33 | 25.20 | 6.66 | 1.16 | 7.72 | 11.26 | 8.49 | 106.01 | |
| 6 | 53.33 | 22.80 | 6.66 | 1.20 | 7.98 | 10.82 | 7.79 | 102.72 | — |
| 7 | 53.33 | 20.40 | 6.66 | 1.24 | 8.23 | 10.38 | 7.09 | 99.43 | |
| 8 | 53.33 | 18.00 | 6.66 | 1.28 | 8.49 | 9.94 | 6.40 | 96.16 | 96.16 |
| 9 | 53.33 | 15.60 | 6.66 | 1.32 | 8.76 | 9.50 | 5.70 | 92.89 | |
| 10 | 53.33 | 13.20 | 6.66 | 1.36 | 9.02 | 9.06 | 5.00 | 89.61 | |
| 11 | 53.33 | 10.80 | 6.66 | 1.40 | 9.29 | 8.62 | 4.30 | 86.34 | — |
| 12 | 53.33 | 8.40 | 6.66 | 1.44 | 9.55 | 8.18 | 3.61 | 83.07 | |
| 13 | 53.33 | 6.00 | 6.66 | 1.48 | 9.82 | 7.74 | 2.91 | 79.80 | 79.80 |
| 14 | 53.33 | 3.60 | 6.66 | 1.52 | 10.08 | 7.30 | 2.21 | 76.48 | |
| 15 | 53.38 | 1.20 | 6.76 | 1.56 | 10.35 | 6.86 | 1.51 | 73.26 | |

1—Computed at 4½ percent on the mid year balance.
2—Based on $100.00 to allow for ten percent salvage value.
3—Estimated at an average annual increase of 0.04.
4—Computed at 6.62 percent on mid year balance.
5—Computed at 0.01163 times mid year value. See Exh. R-1, Pg. 73, Col. 3, Line 5.

## TABLE 2

### Approximate Annual Cost Per $1,000 of Investment

| Car Age | Depreciation or Principal | Index [1] | Depreciation or Adj. Principal | Interest [2] | Taxes [3] | Total | Five Year Averages |
|---|---|---|---|---|---|---|---|
| 1 | $60.00 | 1.00 | $60.00 | $64.21 | $11.28 | $135.49 | |
| 2 | 60.00 | 1.04 | 62.40 | 60.24 | 10.58 | 133.22 | |
| 3 | 60.00 | 1.08 | 64.80 | 56.27 | 9.89 | 130.96 | $130.96 |
| 4 | 60.00 | 1.12 | 67.20 | 52.29 | 9.19 | 128.68 | |
| 5 | 60.00 | 1.16 | 69.60 | 48.32 | 8.49 | 126.41 | |
| 6 | 60.00 | 1.20 | 72.00 | 44.35 | 7.79 | 124.14 | — |
| 7 | 60.00 | 1.24 | 74.40 | 40.38 | 7.09 | 121.87 | |
| 8 | 60.00 | 1.28 | 76.80 | 36.40 | 6.40 | 119.60 | 119.60 |
| 9 | 60.00 | 1.32 | 79.20 | 32.43 | 5.70 | 117.33 | |
| 10 | 60.00 | 1.36 | 81.60 | 28.46 | 5.00 | 115.06 | |
| 11 | 60.00 | 1.40 | 84.00 | 24.49 | 4.30 | 112.79 | — |
| 12 | 60.00 | 1.44 | 86.40 | 20.51 | 3.61 | 110.52 | |
| 13 | 60.00 | 1.48 | 88.80 | 16.54 | 2.91 | 108.25 | 108.25 |
| 14 | 60.00 | 1.52 | 91.20 | 12.56 | 2.21 | 105.97 | |
| 15 | 60.00 | 1.56 | 93.60 | 8.59 | 1.51 | 103.70 | |
| After 15 years | | | | 6.62 | 1.16 | 7.78 | 7.78 |

1—Estimated at an average annual increase of 0.04.
2—Computed at 6.62 percent on mid year balance.
3—Computed at 0.01163 times mid year value. See Exh. R-1, Pg. 73, Col. 3, Line. 5.

While precise reimbursement of the ownership burden would seem to require proportionate contribution of the costs of ownership in the same amounts and within the same period of time, that they must be met by the owner, the record demonstrates that car owners have not generally viewed reimbursement with such precision as essential to equitable treatment. By spreading the recovery of capital costs over a thirty year period, the impact of car hire charges on users has been mitigated and, although the immediate return to the owners has been somewhat lessened, the total receipts over the thirty year period have been greater than would have been received by using a shorter period.[82] In general, freight cars have been kept in active service at least that same length of time. Since all owners are users, and nearly all users are owners, the acceptance of this discrepancy between the manner in which the owner must meet the burden and the manner in which it is reimbursed, indicates an accommodation of interests which has produced a practical equity entitled to substantial weight in the disposition of these proceedings.

A further consideration which may not be ignored is the fact that the freight rates charged shippers, which are the source of income from which each user must pay its proportion of the costs of the service, generally are constructed with reference to costs of operation based upon a spreading of capital costs of revenue earning equipment over periods substantially longer than 15 years. While the amounts included as charges to depreciation and return on depreciated investment in freight cars represent only a portion of the total considered in assessing the compensative qualities of freight rates, they are not insignificant.

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[82] AAR rate calculations use approximately 3 percent per year of the cost of the car as the charge to depreciation.

In this proceeding, only Southern Railway urges the use of the shortened period of 14 years to reimburse the owner's capital costs. None other of the several hundred common carriers by railroad which are parties to this proceeding support this change in the prevailing 30 year period. On brief, the 20 road group urges that the depreciation period be continued at 30 years for cars in the lower three value groups, and that a period of 20 years be employed for cars in the higher groups. It does not appear that any suggestion to this effect was made to the AAR at the time the multiple-level rates were being calculated by its staff nor did the proponents urge or offer evidence in its support during the hearings. The Examiner does not consider either proposal practicable at this time. The record herein demonstrates that railroad freight cars are used for periods which greatly exceed the suggested periods of 14 and 20 years. There is no convincing evidence that railroad management generally considers cars to be no longer economically useful after these periods have expired. As of January 1, 1962, nearly 38 percent of the cars in service were over twenty years old, and over 49 percent were over fifteen years old. While managerial views might differ as to the advisability of retaining some of the older cars, it is evident that car owners do not consider them unserviceable after 15 or 20 years of use.[83] Nor can it be found that cars now being constructed will be subjected to any different treatment in this respect.

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[83] Of some 1,606,475 freight cars in interchange service, on January 1, 1962, 324,729, or 20.2 percent, were over 30 years of age. Over 13,000 of these cars had been in operation for more than 50 years. Ten years earlier, in 1952, the number of cars over 30 years was 315,938, or 17.92 percent of the total. No tendency to a reduction in the useable life of cars is indicated. The record shows depreciation rates on freight cars currently in use by a number of railroads which range from 2.55 percent to 3.60 percent.

Attention is called to the fact that recent revisions of regulations of the Treasury Department, permit railroads to employ a 14 year period for calculation of charges to depreciation. Although it is argued that this represents a considered assessment by the Department of the realistic economic life of freight cars, the record does not support such a conclusion. Neither the revised regulations nor the factors which underlay the change in depreciation period allowances were shown. So far as appears on this record the change stems from a policy decision to encourage investment, and is applicable to a carrier only if it satisfies the Department that particular proportions of its capital are being renewed according to a prescribed schedule. Freight car value apparently comprises only a portion of the total involved. In view of the facts of record as to the periods over which freight cars are retained in use, no weight can be accorded to the conclusions sought to be drawn from the action of the Treasury Department.[84]

If the return of the owner's investment is to be spread over a thirty year period, however, some recognition must be given to the burden of carrying the investment over the longer period. To the extent that the owner has financed the car with borrowed funds, it need recover annually only the amount of payments of principal and interest, the former, without provision for inflation,[85] and

[84] It appears that the benefit of the shorter period for write off of capital expenditures is subject to proof by the carrier that it is satisfying the prescribed standards within a specific period, and that a number of carriers are seeking an extension of the period in which such proof may be made. The test apparently is based upon dollar totals rather than with reference to the lives of specific equipment.

[85] Since the funds are received and paid annually in dollars of purchasing power the same as the owner must pay annually to the underwriters.

the latter at the actual rate of interest applicable thereto. On its own cash investment, it should receive proportionate payments to cover return of principal and interest, the former adjusted for inflationary effects and the latter at 6.62 percent before taxes. Since borrowed funds generally are repayable in 15 years, on a 30 year basis the owner must necessarily carry the difference in payments, which it should recover during the final 15 years. If the owner has paid the full cost of the car, it should receive its return of principal within the same period, and, on a 30 year basis is required to carry the difference over the longer period. Where compensation is received over the longer period, return of capital outlay should be adjusted for inflation over the entire period, with interest at 6.62 percent on the unreturned balance. Table 3, below, shows the annual costs, calculated in the same manner as Table 2, but employing a 30 year period for recovery of the original cost. This table, which assumes full payment of the original cost by the owner, is, in result, similar to calculation of the depreciation charge on a reproduction cost base, and allowance of annual interest on the depreciated balance of the original cost.

In order to give recognition to the difference in the ownership burden resulting from the customary practice of financing the larger part of the cost of purchasing or constructing cars, Table 4, below, shows in similar fashion, the capital costs over a 30 year period, assuming a 20 percent cash payment by the owner and 80 percent financing. While there are instances in which equipment acquisitions are made without cash payment by the owner, there are others in which the payment exceeds 20 percent. The Examiner finds that Table 3 and 4 fairly represent the extremes of ownership burden for the included items and provide a reasonable measure thereof.[86]

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[86] See Footnote No. 79, supra.

TABLE 3

| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
|---|---|---|---|---|---|---|---|
| Years Installed [1] | Return of Cost [2] | Index [3] | Adj. Return [4] | Interest [5] | Taxes [6] | Total [7] | Five Year Averages |
| 1 | $30 | 1.00 | $30.00 | $65.21 | $11.43 | $106.64 | |
| 2 | 30 | 1.04 | 31.20 | 63.22 | 11.08 | 105.50 | |
| 3 | 30 | 1.08 | 32.40 | 61.24 | 10.73 | 104.37 | $104.37 |
| 4 | 30 | 1.12 | 33.60 | 59.25 | 10.38 | 103.23 | |
| 5 | 30 | 1.16 | 34.80 | 57.27 | 10.03 | 102.10 | |
| 6 | 30 | 1.20 | 36.00 | 55.28 | 9.69 | 100.97 | |
| 7 | 30 | 1.24 | 37.20 | 53.30 | 9.34 | 99.83 | |
| 8 | 30 | 1.28 | 38.40 | 51.31 | 8.99 | 98.70 | 98.70 |
| 9 | 30 | 1.32 | 39.60 | 49.33 | 8.64 | 97.56 | |
| 10 | 30 | 1.36 | 40.80 | 47.34 | 8.29 | 96.43 | |
| 11 | 30 | 1.40 | 42.00 | 45.36 | 7.94 | 95.29 | |
| 12 | 30 | 1.44 | 43.20 | 43.37 | 7.59 | 94.16 | |
| 13 | 30 | 1.48 | 44.40 | 41.38 | 7.25 | 93.03 | 93.03 |
| 14 | 30 | 1.52 | 45.60 | 39.39 | 6.90 | 91.89 | |
| 15 | 30 | 1.56 | 46.80 | 37.40 | 6.56 | 90.76 | |
| 16 | 30 | 1.60 | 48.00 | 35.42 | 6.22 | 89.64 | |
| 17 | 30 | 1.64 | 49.20 | 33.43 | 5.87 | 88.50 | |
| 18 | 30 | 1.68 | 50.40 | 31.45 | 5.52 | 87.37 | 87.37 |
| 19 | 30 | 1.72 | 51.60 | 29.46 | 5.18 | 86.24 | |
| 20 | 30 | 1.76 | 52.80 | 27.47 | 4.83 | 85.10 | |
| 21 | 30 | 1.80 | 54.00 | 25.49 | 4.48 | 83.97 | |
| 22 | 30 | 1.84 | 55.20 | 23.50 | 4.13 | 82.83 | |
| 23 | 30 | 1.88 | 56.40 | 21.51 | 3.78 | 81.69 | 81.69 |
| 24 | 30 | 1.92 | 57.60 | 19.53 | 3.43 | 80.56 | |
| 25 | 30 | 1.96 | 58.80 | 17.54 | 3.08 | 79.42 | |
| 26 | 30 | 2.00 | 60.00 | 15.55 | 2.73 | 78.28 | |
| 27 | 30 | 2.04 | 61.20 | 13.56 | 2.38 | 77.15 | |
| 28 | 30 | 2.08 | 62.40 | 11.58 | 2.03 | 76.01 | 76.01 |
| 29 | 30 | 2.12 | 63.60 | 9.59 | 1.68 | 74.88 | |
| 30 | 30 | 2.16 | 64.80 | 7.61 | 1.33 | 73.74 | |
| After 30 Years | | | | 0.62 | 1.16 | 7.78 | |
| | | | | | 30 Year Total — | $2,705.84 | |

1—Age of car in years of per diem service.

2—Less 10 percent salvage value.

3—Approximated cost increase index for purposes of this table. Actual index will require annual determination, and substitution herein.

4—Amount to equate in dollars of current purchasing power, the dollars actually expended to purchase or build car.

5—Computed at 6.62 percent before taxes on balance of full cash payment.

6—Computed at .01163 of mid-year value; based on original cost.

7—Per $1,000 of original cost. Sum of Columns 4, 5, and 6.

TABLE 4

| | Loan $800.00 | | Cash $200.00 | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| Car Age [1] | Princ. | Int. | Princ.[2] | Index [3] | Adj. Princ.[4] | Int.[5] | Taxes [6] | Total [7] | 5 Year Averages |
| 1 | $26.66 | $35.40 | $3.33 | 1.00 | $3.33 | $13.13 | $11.43 | $89.95 | |
| 2 | " | 34.20 | " | 1.04 | 3.46 | 12.91 | 11.08 | 88.31 | |
| 3 | " | 33.00 | " | 1.08 | 3.60 | 12.69 | 10.73 | 86.68 | $86.68 |
| 4 | " | 31.80 | " | 1.12 | 3.73 | 12.47 | 10.38 | 85.04 | |
| 5 | " | 30.60 | " | 1.16 | 3.87 | 12.25 | 10.03 | 83.41 | |
| 6 | " | 29.40 | " | 1.20 | 4.00 | 12.03 | 9.69 | 81.78 | |
| 7 | " | 28.20 | " | 1.24 | 4.14 | 11.81 | 9.34 | 80.15 | |
| 8 | " | 27.00 | " | 1.28 | 4.27 | 11.59 | 8.99 | 78.51 | 78.51 |
| 9 | " | 25.80 | " | 1.32 | 4.41 | 11.37 | 8.64 | 76.88 | |
| 10 | " | 24.60 | " | 1.36 | 4.54 | 11.15 | 8.29 | 75.24 | |
| 11 | " | 23.40 | " | 1.40 | 4.68 | 10.93 | 7.94 | 73.61 | |
| 12 | " | 22.20 | " | 1.44 | 4.81 | 10.71 | 7.59 | 71.97 | |
| 13 | " | 21.00 | " | 1.48 | 4.95 | 10.49 | 7.25 | 70.35 | 70.35 |
| 14 | " | 19.80 | " | 1.52 | 5.08 | 10.27 | 6.90 | 68.71 | |
| 15 | " | 18.60 | " | 1.56 | 5.22 | 10.05 | 6.56 | 67.09 | |
| 16 | " | 17.40 | " | 1.60 | 5.35 | 9.83 | 6.22 | 65.46 | |
| 17 | " | 16.20 | " | 1.64 | 5.49 | 9.61 | 5.87 | 63.83 | |
| 18 | " | 15.00 | " | 1.68 | 5.62 | 9.39 | 5.52 | 62.19 | 62.19 |
| 19 | " | 13.80 | " | 1.72 | 5.76 | 9.17 | 5.18 | 60.57 | |
| 20 | " | 12.60 | " | 1.76 | 5.89 | 8.95 | 4.83 | 58.93 | |
| 21 | " | 11.40 | " | 1.80 | 6.03 | 8.73 | 4.48 | 57.30 | |
| 22 | " | 10.20 | " | 1.84 | 6.16 | 8.51 | 4.13 | 55.66 | |
| 23 | " | 9.00 | " | 1.88 | 6.30 | 8.29 | 3.78 | 54.03 | 54.03 |
| 24 | " | 7.80 | " | 1.92 | 6.43 | 8.07 | 3.43 | 52.39 | |
| 25 | " | 6.60 | " | 1.96 | 6.57 | 7.85 | 3.08 | 50.76 | |
| 26 | " | 5.40 | " | 2.00 | 6.70 | 7.63 | 2.73 | 49.12 | |
| 27 | " | 4.20 | " | 2.04 | 6.84 | 7.41 | 2.38 | 47.49 | |
| 28 | " | 3.00 | " | 2.08 | 6.97 | 7.19 | 2.03 | 45.85 | 45.85 |
| 29 | " | 1.80 | " | 2.12 | 7.11 | 6.97 | 1.63 | 44.22 | |
| 30 | " | 0.60 | " | 2.16 | 7.24 | 6.75 | 1.33 | 42.58 | |
| After 30 Years | | | | | | 6.62 | 1.16 | 7.78 | 7.78 |
| | | | | | | | 30 Year Total | $1988.06 | |

1—Age of car in years of per diem service.
2—Less 10 percent salvage value.
3—Approximated cost increase index for purposes of this table. Actual index will require annual determination, and substitution herein.
4—Amount to equate in dollars of current purchasing power, the dollars actually expended to purchase or build car.
5—Computed at 6.62 percent before taxes on balance of full cash payment.
6—Computed at .01163 of mid-year value, based on original cost.
7—Per $1,000 of original cost. Sum of Columns 2, 3, 6, 7, and 8.

During the period that capital costs are being paid, all users, including the owners, should contribute according to the extent of use each makes of the cars. No reason appears why, during the pendency of this period, any radical differences should exist between payments for different years, except those that are the product of changes in the financial burden of the owner. As appears by Tables 1 through 4, there is a gradual reduction in the interest and tax charges, which is partly off set by the impact of inflationary forces on the unpaid balance of the principal amount invested by the owner. Separate computations on an annual basis, however, do not appear essential to equitable distribution of the charges, and averages of four or five year periods, as suggested by Southern Railway, constitute a practicable reduction in detail. Upon termination of the period when capital costs other than salvage value have been recovered, no reason appears why users should then pay for the costs other than taxes, repairs and maintenance, and interest on the remaining value of the car dedicated to the service. An appreciable reduction in the rental rate would then occur, but would be rationally the product of the reduced burden of the owner.

In recent years, increasingly greater sums have been expended for hire of freight cars from non-railroad owners. In 1953 the reported amount was $9,431,201. In 1959 it had risen to $32,890,216, and by 1962, to $68,949,490. These costs arise from the provisions of numerous contracts entered into independently by various railroads, the details of which are not of record. The extent to which the rental costs of such cars are compensated, by use of capital costs calculated as described above cannot be ascertained, and it is necessary to assume, for the present, that the difference, if any, would not be significant.[87] Car

[87] Thirty-three leases by 10 railroads with Equitable Life Assurance Society between 1950 and 1962 indicate rental charges which would be reimbursed by rates based on costs calculated in this

owners, i.e., lessees of such cars, have not found it necessary to make special provision for recovery of this element of cost under past rates.

Upon all the evidence, the Examiner finds that the costs related to the acquisition of cars, and the taxes thereon, can most reasonably and accurately be determined in the fashion indicated by Table 4. It is found that costs determined by use of a depreciation charge and allowance of interest on the undepreciated balance of the cost of the car, do not provide a reliable measure of the ownership burden for these items, result in payments which are in excess of reasonable compensation, and are unjust, unreasonable, and unfairly discriminate against users of foreign cars.

## V—Present Multi-Level System

The multi-level rate system introduces for the first time a long range concept of per diem charging, which contemplates the recovery of capital costs over the period in which the car is depreciated. This concept requires that the method be tested, not only with reference to the reasonableness of charges provided for the present period, but also with reference to its overall effect and its adequacy to accomplish the intended results.

For the purposes of the comparisons which follow, the figures developed in Tables 3 and 4 have been employed as a guide, per diem payable days per car taken at 306, and annual repair costs at $390.00 [88] As heretofore noted, the

[88] By reference to the 1960 figure of $388.80. Summary T-1 calculations from the Form H formula indicate average repair costs per car of some $372.00 in 1961 and $398.00 in 1962. The latter figures are derived by dividing the total repair and maintenance figures of $594,394,469 and $613,895,199, in Exhibits R-245 and R-246 by the average number of per diem cars in use. The latter figure derived by taking 97 percent of the average of all cars at the beginning and end of year.

use of the same repair cost and car day divisor for all cars is criticized by some respondents as productive of substantial inaccuracies. There are, however, no statistics upon which to base any findings in these respects. Until such time as reliable information is available with respect to these two factors, it is necessary to rely upon the average figures. Those developed by the Cost Section studies are the best available in this record and will be employed, in connection with the investment costs to approximate the ownership burden. Set forth below are the present multi-level rates, as most recently revised, together with the revenue therefrom assuming 306 days of per diem payable use per year on both home and foreign lines.

TABLE 5

| | Bracket | Rate | Per Diem Revenue [89] | Revenue Less Repairs |
|---|---|---|---|---|
| (1) | Under $1,000 | $2.16 | $ 660.96 | $ 270.96 |
| (2) | $1,000-5,000 | 2.79 | 853.74 | 463.74 |
| (3) | 5,001-10,000 | 3.58 | 1,095.48 | 705.48 |
| (4) | 10,001-15,000 | 4.50 | 1,377.00 | 987.00 |
| (5) | 15,001-20,000 | 6.15 | 1,881.90 | 1,491.90 |
| (6) | 20,000.01-25,000 | 7.11 | 2,175.66 | 1,785.66 |
| (7) | 25,000.01-30,000 | 9.00 | 2,754.00 | 2,364.00 |
| (8) | 30,000.01-35,000 | 10.18 | 3,115.08 | 2,725.08 |
| (9) | 35,000.01 and over | 12.18 | 3,727.08 | 3,337.08 |

[89] Denoting the actual per diem revenue from users plus the amounts which would have accrued had the owner charged itself in the same fashion for its use of the car, based upon 306 per diem payable days.

By deducting the average annual cost of repairs and maintenance there is indicated the approximate amount available to meet the balance of the ownership burden consisting of the taxes and investment costs. Table 6 which follows, sets forth for cars of various costs, the years spent in each of the brackets, the indicated per diem revenue less repair and maintenance, and the approximate comparable ownership burden.[90] This table indicates that, over a 30 year depreciation period, the present multi-level method greatly overcompensates for cars of less than $6,000 value, and fails to compensate for cars of greater value.

Table 7 shows the total revenues from the present rates and the indicated owner's burden on a year to year basis, for cars of $6,000, $10,000, $20,000 and $30,000 value and portrays in more detail the failure of the present rates to compensate the owner of more expensive cars for its capital outlay.

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[90] From Tables 3 and 4.

TABLE 6

| | $2,000 | $4,000 | $6,000 | $10,000 | $14,000 | $20,000 | $24,000 | $30,000 | $34,000 |
|---|---|---|---|---|---|---|---|---|---|
| BR-9—Years<br>Rev. | | | | | | | | | |
| BR-8—Years<br>Rev. | | | | | | | | | 4<br>10,900.32 |
| BR-7—Years<br>Rev. | | | | | | | | 6<br>14,184.00 | 5<br>11,820.00 |
| BR-6—Years<br>Rev. | | | | | | | 6<br>10,713.96 | 6<br>10,713.96 | 5<br>8,928.30 |
| BR-5—Years<br>Rev. | | | | | | 9<br>13,427.10 | 7<br>10,443.30 | 5<br>7,459.50 | 5<br>7,459.50 |
| BR-4—Years<br>Rev. | | | | | 10<br>9,870.00 | 8<br>7,896.00 | 7<br>6,909.00 | 6<br>5,922.00 | 5<br>4,935.00 |
| BR-3—Years<br>Rev. | | | 6<br>4,232.88 | 17<br>11,993.16 | 12<br>8,465.76 | 8<br>5,643.84 | 7<br>4,938.36 | 4<br>2,821.92 | 5<br>3,527.40 |
| BR-2—Years<br>Rev. | 17<br>7,883.58 | 25<br>11,593.50 | 22<br>10,202.28 | 13<br>6,028.62 | 8<br>3,709.92 | 5<br>2,318.70 | 3<br>1,391.22 | 3<br>1,391.22 | 1<br>463.74 |
| BR-1—Years<br>Rev. | 13<br>3,522.48 | 5<br>1,354.80 | 2<br>541.92 | | | | | | |
| 30 Yr. Total Rev. | 11,406.06 | 12,948.30 | 14,977.08 | 18,021.78 | 22,045.68 | 29,285.64 | 34,395.84 | 42,492.60 | 48,034.26 |
| 30 Yr. Burden(a) | 5,411.68 | 10,823.36 | 16,235.04 | 27,058.40 | 37,881.76 | 54,116.80 | 64,940.16 | 81,175.20 | 91,998.56 |
| 30 Yr. Burden(b) | 3,976.12 | 7,952.24 | 11,928.36 | 19,880.60 | 27,832.84 | 39,761.20 | 47,713.44 | 59,641.80 | 67,594.04 |

(a)—Table 3, Col. 7 total multiplied by thousands of dollars.
(b)—Table 4, Col. 9 total multiplied by thousands of dollars.

## TABLE 7

| Cost | (6,000) | | (10,000) | | (20,000) | | (30,000) | |
|---|---|---|---|---|---|---|---|---|
| Age | Revenue | Burden | Revenue | Burden | Revenue | Burden | Revenue | Burden |
| 1 | 1,095.48 | 1,029.84 | 1,095.48 | 1,456.40 | 1,881.90 | 2,522.80 | 2,754.00 | 3,589.20 |
| 2 | 1,095.48 | 1,023.00 | 1,095.48 | 1,445.00 | 1,881.90 | 2,500.00 | 2,754.00 | 3,555.00 |
| 3 | 1,095.48 | 1,016.22 | 1,095.48 | 1,433.70 | 1,881.90 | 2,477.40 | 2,754.00 | 3,520.10 |
| 4 | 1,095.48 | 1,009.38 | 1,095.48 | 1,422.30 | 1,881.90 | 2,454.60 | 2,754.00 | 3,486.90 |
| 5 | 1,095.48 | 1,002.60 | 1,095.48 | 1,411.00 | 1,881.90 | 2,432.00 | 2,754.00 | 3,453.00 |
| 6 | 1,095.48 | 995.82 | 1,095.48 | 1,399.70 | 1,881.90 | 2,409.40 | 2,754.00 | 3,419.10 |
| 7 | 853.74 | 987.98 | 1,095.48 | 1,388.30 | 1,881.90 | 2,386.60 | 2,175.66 | 3,384.90 |
| 8 | 853.74 | 982.20 | 1,095.48 | 1,377.00 | 1,881.90 | 2,364.00 | 2,175.66 | 3,351.00 |
| 9 | 853.74 | 975.36 | 1,095.48 | 1,365.60 | 1,881.90 | 2,341.20 | 2,175.66 | 3,316.80 |
| 10 | 853.74 | 968.58 | 1,095.48 | 1,354.30 | 1,377.00 | 2,318.60 | 2,175.66 | 3,282.90 |
| 11 | 853.74 | 961.74 | 1,095.48 | 1,342.90 | 1,377.00 | 2,295.80 | 2,175.66 | 3,248.70 |
| 12 | 853.74 | 954.96 | 1,095.48 | 1,331.60 | 1,377.00 | 2,273.20 | 2,175.66 | 3,214.80 |
| 13 | 853.74 | 948.18 | 1,095.48 | 1,320.30 | 1,377.00 | 2,250.60 | 1,881.90 | 3,180.90 |
| 14 | 853.74 | 941.34 | 1,095.48 | 1,308.90 | 1,377.00 | 2,227.80 | 1,881.90 | 3,146.70 |
| 15 | 853.74 | 934.56 | 1,095.48 | 1,297.60 | 1,377.00 | 2,205.20 | 1,881.90 | 3,112.80 |
| 16 | 853.74 | 927.84 | 1,095.48 | 1,286.40 | 1,377.00 | 2,182.80 | 1,881.90 | 3,079.20 |
| 17 | 853.74 | 921.00 | 1,095.48 | 1,275.00 | 1,377.00 | 2,160.00 | 1,881.90 | 3,045.00 |
| 18 | 853.74 | 914.22 | 853.74 | 1,263.70 | 1,095.48 | 2,137.40 | 1,377.00 | 3,011.10 |
| 19 | 853.74 | 907.44 | 853.74 | 1,252.40 | 1,095.48 | 2,114.80 | 1,377.00 | 2,977.20 |
| 20 | 853.74 | 930.60 | 853.74 | 1,241.00 | 1,095.48 | 2,092.00 | 1,377.00 | 2,943.00 |
| 21 | 853.74 | 893.82 | 853.74 | 1,229.70 | 1,095.48 | 2,069.40 | 1,377.00 | 2,909.10 |
| 22 | 853.74 | 886.98 | 853.74 | 1,218.30 | 1,095.48 | 2,046.60 | 1,377.00 | 2,874.90 |
| 23 | 853.74 | 880.14 | 853.74 | 1,206.90 | 1,095.48 | 2,023.80 | 1,377.00 | 2,840.70 |
| 24 | 853.74 | 873.36 | 853.74 | 1,195.60 | 1,095.48 | 2,000.20 | 1,095.48 | 2,806.80 |
| 25 | 853.74 | 866.52 | 853.74 | 1,184.20 | 1,095.48 | 1,978.40 | 1,095.48 | 2,772.60 |
| 26 | 853.74 | 859.68 | 853.74 | 1,172.80 | 853.74 | 1,955.60 | 1,095.48 | 2,738.40 |
| 27 | 853.74 | 852.90 | 853.74 | 1,161.50 | 853.74 | 1,933.00 | 1,095.48 | 2,704.50 |
| 28 | 853.74 | 846.06 | 853.74 | 1,150.10 | 853.74 | 1,910.20 | 853.74 | 2,670.30 |
| 29 | 660.96 | 839.28 | 853.74 | 1,138.80 | 853.74 | 1,887.60 | 853.74 | 2,636.40 |
| 30 | 660.96 | 832.44 | 853.74 | 1,127.40 | 853.74 | 1,864.80 | 853.74 | 2,602.20 |

Revenue at rate applicable to particular bracket times 306 per diem payable days.

Burden comprised of annual cost for each year taken from Column 7 of Table 3 times thousands of dollars of cost, plus repairs at $390.00. Similar differences result if comparison is made using Table 4.

While the two previous tables assume that the annual average of per diem payable days for active cars will be 306, and that the annual average of repair and maintenance costs will be $390.00, similar results are produced by use of other figures. Use of a higher number of per diem payable days would increase the indicated revenue, narrowing the deficiency on higher cost cars, but enlarging the excess of reimbursement on the older cars.[91] Reduced costs of repairs would have a similar effect. Rate increases in the future would be largely the product of higher repair and maintenance costs, or changes in the car day divisor, offering no improvement in the return of capital invested. Increases required by higher depreciation and interest allowances would not relieve the problem.

The extent to which the AAR rates fail to meet the ownership burden in the 30-year period can also be tested by comparing the original cost of the car with the present worth, at time of purchase, of the indicated total car rental revenue in that period. Using standard 6½ percent discount factors [92] introduced in evidence by Southern Railway and annual revenues less repair costs shown in Table 6, the present worth of receipts for cars of $6,000, $10,000, $20,000, and $34,000 are shown in Table 8. While receipts for the $6,000 car appear reasonably related to the original cost, those for the higher cost cars fail by continually increasing margins to match the cost.[93]

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[91] Thus, using the approximate figure of 335 active car days employed by the AAR, the annual revenue from each bracket would be: (1) 723.60, (2) 934.65, (3) 1,199.30, (4) 1,507.50 (5) 2,060.25, (6) 2,381.85, (7) 3,015.00, (8) 3,410.30, (9) 4,080.30.

[92] This percentage is slightly less than the 6.62 percent used by the Cost Section in order to produce a return after taxes of 4 percent on 1960 figures. It is used here for convenience and is conservative in its showing, since the present worth would be lower if based upon the higher percentage.

[93] It appears impracticable to attempt an estimate for carriers as a whole, as to the extent these figures would be affected by consideration of investment tax credits or possible income tax savings, as suggested by some respondents. Their impact appears too conjectural to support necessary findings.

TABLE 8

| $6,000 | | $10,000 | | $20,000 | | $34,000 | |
|---|---|---|---|---|---|---|---|
| Revenue | Discount Value | Revenue | Discount Value | Revenue | Discount Value | Revenue | Discount Value |
| 705.48 | 662.42 | 705.48 | 662.42 | 1,491.90 | 1,400.85 | 2,725.08 | 2,558.76 |
| 705.48 | 621.99 | 705.48 | 621.99 | 1,491.90 | 1,315.35 | 2,725.08 | 2,402.59 |
| 705.48 | 584.03 | 705.48 | 584.03 | 1,491.90 | 1,235.07 | 2,725.08 | 2,255.95 |
| 705.48 | 548.39 | 705.48 | 548.39 | 1,491.90 | 1,159.69 | 2,725.08 | 2,118.27 |
| 705.48 | 514.92 | 705.48 | 514.92 | 1,491.90 | 1,088.91 | 2,364.00 | 1,725.44 |
| 705.48 | 483.49 | 705.48 | 483.49 | 1,491.90 | 1,022.45 | 2,364.00 | 1,620.13 |
| 463.74 | 298.42 | 705.48 | 453.98 | 1,491.90 | 960.05 | 2,364.00 | 1,521.25 |
| 463.74 | 280.21 | 705.48 | 426.27 | 1,491.90 | 901.45 | 2,364.00 | 1,428.40 |
| 463.74 | 263.10 | 705.48 | 400.26 | 1,491.90 | 846.43 | 2,364.00 | 1,341.22 |
| 463.74 | 247.05 | 705.48 | 375.83 | 987.00 | 525.80 | 1,785.66 | 951.27 |
| 463.74 | 231.97 | 705.48 | 352.89 | 987.00 | 493.71 | 1,785.66 | 893.21 |
| 463.74 | 217.81 | 705.48 | 331.35 | 987.00 | 463.58 | 1,785.66 | 838.69 |
| 463.74 | 204.52 | 705.48 | 311.13 | 987.00 | 435.28 | 1,785.66 | 787.51 |
| 463.74 | 192.03 | 705.48 | 292.14 | 987.00 | 408.72 | 1,785.66 | 739.44 |
| 463.74 | 180.31 | 705.48 | 274.31 | 987.00 | 303.77 | 1,491.90 | 580.09 |
| 463.74 | 169.31 | 705.48 | 257.57 | 987.00 | 360.35 | 1,491.90 | 544.69 |
| 463.74 | 158.98 | 705.48 | 241.85 | 987.00 | 338.36 | 1,491.90 | 511.44 |
| 463.74 | 149.27 | 463.74 | 149.27 | 705.48 | 227.09 | 1,491.90 | 480.23 |
| 463.74 | 140.16 | 463.74 | 140.16 | 705.48 | 213.23 | 1,491.90 | 450.92 |
| 463.74 | 131.61 | 463.74 | 131.61 | 705.48 | 200.21 | 987.00 | 280.11 |
| 463.74 | 123.58 | 463.74 | 123.58 | 705.48 | 187.99 | 987.00 | 263.01 |
| 463.74 | 116.03 | 463.74 | 116.03 | 705.48 | 176.52 | 987.00 | 246.96 |
| 463.74 | 108.95 | 463.74 | 108.95 | 705.48 | 165.75 | 987.00 | 231.89 |
| 463.74 | 102.30 | 463.74 | 102.30 | 705.48 | 155.63 | 987.00 | 217.73 |
| 463.74 | 96.06 | 463.74 | 96.06 | 705.48 | 146.13 | 705.48 | 146.13 |
| 463.74 | 90.20 | 463.74 | 90.20 | 463.74 | 90.20 | 705.48 | 137.21 |
| 463.74 | 84.69 | 463.74 | 84.69 | 463.74 | 84.69 | 705.48 | 128.84 |
| 463.74 | 79.52 | 463.74 | 79.52 | 463.74 | 79.52 | 705.48 | 120.98 |
| 270.96 | 43.63 | 463.74 | 74.67 | 463.74 | 74.67 | 705.48 | 113.59 |
| 270.96 | 40.97 | 463.74 | 70.11 | 463.74 | 70.11 | 463.74 | 70.11 |
| Total | 7,165.92 | Total | 8,499.97 | Total | 15,211.56 | Total | 25,706.06 |

Reference to Table 6 also discloses substantial variations in the percentage relationships of car rental revenue, minus repairs, to the original capital cost to be recovered, as between cars of different values.

TABLE 9

| Orig. Cost | 30 Year Revenue | Percent Recovery Orig. Cost |
|---|---|---|
| $2,000 | $11,406.06 | 570% |
| 4,000 | 12,948.30 | 320% |
| 6,000 | 14,977.08 | 250% |
| 10,000 | 18,021.78 | 180% |
| 14,000 | 22,045.68 | 157% |
| 20,000 | 29,285.64 | 146% |
| 24,000 | 34,395.84 | 144% |
| 30,000 | 42,492.60 | 141% |
| 34,000 | 48,034.26 | 141% |

These figures suggest that an investment in four $6,000 cars will produce some $26,000 more as contribution to capital costs than an investment of the same amount in one $24,000 car, and the investment of the same amount in six $4,000 cars will produce nearly $44,000 more. The difference between cars over and under $6,000 in cost is marked.

The indicated excess of compensation received by owners of cars valued in the first two brackets of the multi-level rates is the product of assignment of excessive costs to those brackets. The cars are placed in groups according to their original cost plus additions and betterments, depreciated. Within the group, however, they are assigned a value based upon reproduction costs, and the weighted average of such figures employed as the base for the construction of the allowance for depreciation and return on investment. As of January 1, 1962, of some 1,606,475 cars in per diem service, 324,729, or 20.21 per-

cent were over 30 years of age and had, therefore, been fully depreciated. Owners of these cars must be presumed to have recovered their capital investment. At that time, of a group of 974,386 cars studied in connection with the present system of rates, 380,851, or 39.1 percent had average original cost plus additions and betterments depreciated of less than $1,000, while an additional 150,160, or 15.6 percent had an average depreciated cost between $1,000 and $2,000. It may reasonably be inferred that the cars in the group over 30 years of age are included in the two last mentioned value groups. Although these cars had been written down to salvage value, those in the first group received an average depreciated reproduction value of $1,299 and those in the second a value of $3,513, upon which capital charges were computed. Owners receive on such cars, not only a return of capital and interest which has already been recovered, but, in addition, this second return and interest is computed upon an inflated base. Thus, for example, a car built in 1914 at a cost of $873, fully depreciated in 1944, having a salvage value of $87, is treated as having a depreciated value of $545 and an original value of $5,448. Interest at 6 percent on the former, and allowance for depreciation at 3 percent of the latter results in claiming $196 as the annual ownership cost of capital for the car. While some justification may be found for including a normalized depreciation allowance on such cars, based upon original cost, when a single rate applicable to all cars is calculated, none is present where rates are specifically separated according to car values. The resulting compensation is excessive and clearly unreasonable.

During the course of the hearings, and at the request of various parties, the Cost Section conducted a further analysis of its studies, to the extent possible, to develop costs separated between cars of varying values. The value brackets employed were those already chosen by the AAR for construction of the multi-level rates, in order

to afford a basis for comparison.[9] Reports of car valuations, received on Form 6 were analyzed and adjusted to reflect changes through December 31, 1960. Treating each valuation group separately, distributions were made between value brackets, and determination made of original cost, depreciated original cost, reproduction value and depreciated reproduction value for the average car in each bracket. Straight line depreciation at a rate of 3 percent was used, and interest at 6.62 percent before taxes applied to the depreciated investment. Tables were prepared showing the costs, by value brackets, calculated by the T-1, MT-1, MT-2, and MT-3 methods, heretofore described. Since the 1960 studies had not attempted to separate costs by value of car, all costs other than depreciation and interest were treated as invariable. The car day divisor was also treated as constant. Active car days were distributed among the value brackets on the basis of the percentage distribution of the cars owned, and used as divisors to obtain the cost per active car day. These costs were then divided by the ratio of total foreign cars to active foreign cars, to produce the unit cost for each bracket. The Summary T-1 results, are shown below, together with the AAR multi-level rates for the same brackets.

| Bracket | T-1 Orig. Cost | T-1 Repro. Val. | AAR Multi-level |
|---|---|---|---|
| 0-1,000 | 186.681 | 268.913 | 216 |
| 1,001-5,000 | 245.049 | 329.028 | 279 |
| 5,001-10,000 | 372.455 | 411.277 | 358 |
| 10,001-15,000 | 500.235 | 512.045 | 450 |
| 15,001-20,000 | 660.481 | 658.792 | 615 |
| Over 20,000 | 831.382 | 841.716 | 774 |

[9] In using these brackets for convenience, the Cost Section expressly disavowed any suggestion that they were the only ones that could or should be used.

While the number of differences in the underlying calculations prohibits precise comparison between the AAR rates and the T-1 value bracket costs,[*] it is significant that the latter, even on an original cost basis, indicate that the multi-level rates are not compensatory with respect to cars over $5,000 in value. At the same time, the substantially higher rates indicated by the T-1 costs, both on the original cost and reproduction value base, applied over a 30-year period, indicate a total return, less repairs, which, when discounted at 6½ percent, is substantially less than costs for the higher cost cars. If these Summary T-1 costs are substituted for the AAR rates for comparison in Table 6, similar results are produced. Thus, the 30 year revenue on a $14,000 car would be $23,294.16, compared with a minimum indicated burden of $27,832.84.

The inadequacy of overall compensation to the owner for cars in the higher brackets appears to stem primarily from the erratic progression from rate to rate produced by using the depreciated cost of the car as the guide. The span between rates in the different brackets is substantial, and there appears no correlation between the speed of movement between brackets and the speed of changes in the ownership burden. The discrepancy is the product of the long range pattern of changes in and between value brackets, rather than of the rate level at any given time.[**] It cannot be found that the progression of freight

[*] The AAR used a 6 percent interest, while the Cost Section used 6½ percent. Differences also exist in the car day divisor used and in the amount employed as the depreciated value and charge to depreciation. For example, the Cost Section calculated the depreciated reproduction value of cars in the first bracket averaged $2,073, while the AAR estimate was $1,289. The AAR calculated an average annual cost per car in each bracket and divided by a single divisor. The Cost Section calculated a total cost for all cars in each bracket, then divided each by that proportion of total active car days in 1960 that the number of cars in the bracket have to total owned per diem cars.

[**] It may be noted, however, that the present rates for the higher brackets are also of doubtful adequacy.

cars through the multi-level value brackets, and the returns obtained while in each bracket, bear any relation to the progression of the ownership burden in those periods or any consistent relation to the actual amount of that burden. Where the function is to compensate the owner for its actual burden, the use of the depreciating value of the car as a clock to measure periodic changes in rates is unreliable and is found to be unreasonable.[97]

A—*Value Brackets.*

Compensation to owners would most nearly be accomplished by measuring the car rental rate for each car according to its particular cost. Such a method would require rate schedules so complex as to defeat their purpose, however, and some grouping of cars is essential to a practicable system. To be reasonable, the groupings chosen should be so constructed as to contain cars having values reasonably related to the value employed to compute the rate for that group. The groupings, or value brackets, employed in constructing the multi-level rates are challenged as unreasonable both because of their size, and because the rates applicable to some are weighted to reflect the preponderance of cars in the lower portion of the bracket. The analysis of 974,386 cars used by the AAR in developing these brackets and rates is set forth below. Values shown are based on the average original cost, plus additions and betterments, depreciated, as of December 31, 1961.

[97] Instructions issued by the AAR provide that "All cars installed in a calendar year will be depreciated the following January 1st regardless of the month installed, and each succeeding January 1st at the rate of three percent per annum. No car, regardless of age, shall depreciate more than ninety percent as ten percent of the value shall always be retained to represent salvage value." Thus use of January 1st as the anniversary date is not challenged and appears the most practicable method, whether depreciation or age is under consideration.

## TABLE 10

| Value Group | No. of Cars | Distribution |
|---|---|---|
| *1* | | |
| $1,000 and less | 380,851 | 100% |
| *2* | | |
| $1,001-2,000 | 150,160 | 36.94% |
| 2,001-3,000 | 112,112 | 27.58% |
| 3,001-4,000 | 77,776 | 19.14% |
| 4,001-5,000 | 66,406 | 16.34% |
| | | 100.00% |
| *3* | | |
| $5,001-6,000 | 39,031 | 24.58% |
| 6,001-7,000 | 36,459 | 22.96% |
| 7,001-8,000 | 40,461 | 25.50% |
| 8,001-9,000 | 26,818 | 16.89% |
| 9,001-10,000 | 15,992 | 10.07% |
| | | 100.00% |
| *4* | | |
| $10,001-11,000 | 11,155 | 43.24% |
| 11,001-12,000 | 6,930 | 26.87% |
| 12,001-13,000 | 4,999 | 19.38% |
| 13,001-14,000 | 1,939 | 7.52% |
| 14,001-15,000 | 770 | 2.99% |
| | | 100.00% |
| *5* | | |
| $15,001-20,000 | 1,280 | No Analysis |
| *6* | | |
| Over 20,000 | 1,247 | No Analysis |

It is pointed out that, with brackets of this width, cars having actual values placing them at the upper end of the bracket do not receive compensation for their true costs. An example is a TOFC car valued at $13,253, assigned to Bracket No. 4 when installed in per diem service, which would recover in that year as interest, using 6.62 percent, some $768.00, compared with $877.00 based on its actual cost. The rates applicable to Brackets 1, 5, and 6,[98] were based on the average ownership costs, using the reproduction value basis. In Brackets 2, 3, and 4, however, the cars were arranged in sub-groups of $1,000 each, as shown above, and the weighted average used. Thus, in Bracket No. 4, the arithmetical average of the five sub-groups is approximately 474.22 cents per active car day, while the rate of 450 cents results from the preponderance of cars in the lower portion of the group. The rate reflects the cost, as computed by the AAR, for a car of slightly under $11,000 in value. Of some 25,793 cars in this group, over 7,700, or nearly 30 percent, have values exceeding $12,000 and would not be compensated by rates measured by the costs of an $11,000 car. Using as a basis the same AAR calculations which underlie the multi-level rates, cars having values between $12,000 and $15,000, which receive $4.50 per day, incur costs between $4.70 and $5.24 per day. In Bracket No. 3, cars receiving $3.58 per day incur costs ranging from $3.38 to $4.12 per day.

The applicable rates, under the current multi-level plan, change throughout the life of the car by reference to the assumed reduction in the car's value as measured by its depreciated original cost. As heretofore noted, this method produces erratic and inconsistent moves from bracket to bracket which have no discernable relationship to the

[98] Bracket 6 as used here refers to the original publication of January 1, 1964, in which this bracket encompassed all cars over $20,000 in value.

costs then borne by the owner. Since the theory contemplates the annual reduction in the car value, however, it comprehends a period of time when its value exceeds that of the weighted average, and a subsequent period of time when its value will be below that upon which the rate is calculated. To some extent, therefore, the lack of full compensation during the period the car is valued at more than the weighted average car in the bracket is balanced by the excess of compensation during the period the car is below that value. Under this system, however, it will generally be equal only by coincidence.[20] Value brackets which are of such breadth as to apply a single rate to cars having costs of the variability indicated by the AAR calculations are productive of rental income which is unrelated to the ownership burden, and are unreasonable.

B.—*Additions and Betterments.*

When the multi-level rates became effective on January 1, 1964, there was included a method of reporting which attempted to compensate owners for the extra cost of additions and betterments. Additions and betterments made prior to the time the cars were first reported for inclusion in the Master List were coupled with the depreciated cost of the car and additives, if any, to establish the value bracket in which it was to be placed. Subsequent additions and betterments were to be reported on change reports and added to the original valuation, with the anticipated result of either moving the car to a higher bracket or retaining it for a longer time in its then pres-

[20] Taking the $13,253 car mentioned above as an example, this car would depreciate $397.60 per year, allowing 10 percent for salvage. For the first six years its value would exceed $11,000. In the seventh year it would approximate the weighted average, and in the eighth and ninth it would be below. In the tenth year it would drop to the next lower bracket, having received six years of varying undercompensation in exchange for two years of varying overcompensation.

ent bracket. Analysis of the effect of the latter procedure reveals, however, that the resulting increases in revenue bear no reasonable relation to the cost of the additions and betterments.

Table 11, below, shows the total additional revenue which would be derived as a result of an addition or betterment of $500 in each year of the life of eight different cars having original costs ranging from $2,000 to $30,000. Additions or betterments of different amounts would, of course, produce different total results, but it is apparent from the comparisons made in this table, that there is no reasonable relationship between the results produced by the expenditure of the same amount of money on different cars, all of the same age or between the expenditure and the actual recovery in most cases. Thus, an addition costing $500 to a $4,000 car in the 14th year of its life will produce for the owner additional revenue of $192.78. The same amount expended on a $14,000 car in its 14th year produces no additional revenue. An expenditure of the same amount on a $6,000 car in the eighth year of its life results in additional car rental revenue of $192.78 while the same amount expended on a $30,000 car in its eighth year produces no additional revenue. If the A&B is accomplished in the fifth year, the $2,000 and $30,000 cars derive additional revenue of $578.34, the $4,000 car receives $192.78 and the $6,000 car will receive $676.24. The latter will receive $192.78 if the A&B is made in the 26th year but the other cars will receive no return at all for an A & B in that year.

## TABLE 11

RETURN PRODUCED BY A&B OF $500 EFFECTED IN VARIOUS YEARS OF LIFE OF CAR

| Year A & B Effected | 2,000 | 4,000 | 6,000 | 10,000 | 14,000 | 20,000 [1] | 24,000 | 30,000 |
|---|---|---|---|---|---|---|---|---|
| | | | | Indicated Return | | | | |
| 1 | 578.34 | 192.78 | 676.24 | 523.26 | 281.53 | 523.26 | 293.76 | 578.34 |
| 2 | 578.34 | 192.78 | 676.24 | 241.76 | 281.53 | 523.26 | 293.76 | 578.34 |
| 3 | 578.34 | 192.78 | 676.24 | 241.76 | 281.53 | 523.26 | 293.76 | 578.34 |
| 4 | 578.34 | 192.78 | 676.24 | 241.76 | 281.53 | 523.26 | 293.76 | 578.34 |
| 5 | 578.34 | 192.78 | 676.24 | 241.76 | 281.53 | 523.26 | 293.76 | 578.34 |
| 6 | 578.34 | 192.78 | 676.24 | 241.76 | 281.53 | 523.26 | 293.76 | 578.34 |
| 7 | 578.34 | 192.78 | 534.51 | 241.76 | 281.53 | 523.26 | 0 | 0 |
| 8 | 578.34 | 192.78 | 192.78 | 241.76 | 281.53 | 523.26 | 0 | 0 |
| 9 | 578.34 | 192.78 | 192.78 | 241.76 | 281.53 | 523.26 | 0 | 0 |
| 10 | 578.34 | 192.78 | 192.78 | 241.76 | 281.53 | 523.26 | 0 | 0 |
| 11 | 578.34 | 192.78 | 192.78 | 241.76 | 0 | 523.26 | 0 | 0 |
| 12 | 578.34 | 192.78 | 192.78 | 241.76 | 0 | 523.26 | 0 | 0 |
| 13 | 578.34 | 192.78 | 192.78 | 241.76 | 0 | 523.26 | 0 | 0 |
| 14 | 578.34 | 192.78 | 192.78 | 241.76 | 0 | 523.26 | 0 | 0 |
| 15 | 578.34 | 192.78 | 192.78 | 241.76 | 0 | 523.26 | 0 | 0 |
| 16 | 578.34 | 192.78 | 192.78 | 241.76 | 0 | 523.26 | 0 | 0 |
| 17 | 578.34 | 192.78 | 192.78 | 241.76 | 0 | 523.26 | 0 | 0 |
| 18 | 385.56 | 192.78 | 192.78 | 0 | 0 | 241.53 | 0 | 0 |
| 19 | 192.78 | 192.78 | 192.78 | 0 | 0 | 241.53 | 0 | 0 |
| 20 | 0 | 192.78 | 192.78 | 0 | 0 | 241.53 | 0 | 0 |
| 21 | 0 | 192.78 | 192.78 | 0 | 0 | 241.53 | 0 | 0 |
| 22 | 0 | 192.78 | 192.78 | 0 | 0 | 241.53 | 0 | 0 |
| 23 | 0 | 192.78 | 192.78 | 0 | 0 | 241.53 | 0 | 0 |
| 24 | 0 | 192.78 | 192.78 | 0 | 0 | 241.53 | 0 | 0 |
| 25 | 0 | 192.78 | 192.78 | 0 | 0 | 241.53 | 0 | 0 |
| 26 | 0 | 0 | 192.78 | 0 | 0 | 0 | 0 | 0 |
| 27 | 0 | 0 | 192.78 | 0 | 0 | 0 | 0 | 0 |
| 28 | 0 | 0 | 192.78 | 0 | 0 | 0 | 0 | 0 |
| 29 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 30 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

1—Using the $20,000 car as an example, this car, without additions and betterments would spend 9 years in Bracket 5, 8 years in Bracket 4, 8 years in Bracket 3, and 5 years in Bracket 2. An addition or betterment of $500 made in or before the 17th year would keep the car in Bracket 4 one additional year and remove it from Bracket 2 for one year, the net additional revenue being $523.26. If made between the 17th and 25th year, the car would remain one extra year in Bracket 3, and one less year in Bracket 2, for a net revenue increase of $241.53. If made after the 25th year, no revenue change would result.

During the final session of hearings a witness from the AAR testified that, in his opinion, a large part of the reductions in number of cars in value groups 1 and 2 between January 1, and September 1, 1964, was due to retirements of older cars. Access was afforded to the supporting papers and subsequently a witness for Southern Railway testified that the sample data combined in one group both cars retired and cars renumbered. Ruling on motions to strike the testimony of both witnesses was deferred to permit the parties to argue their positions on brief, with the understanding that both motions would be treated alike. Since no party undertook to brief this issue, both motions are denied.

## VI—Alternate Proposals

An economic expert, testifying on behalf of the 20 road group, advocated the calculation of per diem rates by reference to "economic cost", rather than by reference to the actual costs of owning and operating the cars. In substance, the proposal was to measure the per diem revenue to owners by the return which the owner could obtain from alternative investments. The foregoing of the alternative return was said to constitute a lost opportunity cost of capital to the owner, since it represented earnings that could have been obtained had the money been put to some use other than being tied up in freight cars. It was the view of this witness that "what is pertinent for the per diem rate decision is the added investment in added freight cars and the added profits, cash flow earnings that you have if you made the investment as opposed to not making it". The theory requires an attempt to set the per diem rate at the level it would reach if there were a free and open market for the leasing of freight cars and so as to induce railroads to invest in more freight cars.

The method thus espoused is that of the investment advisor and is not, in the opinion of the Examiner, appropriate for application to the problem here presented. It

assumes that cars are built to earn per diem income, and that the demand for freight cars is influenced by the market competition of other railroads for foreign cars rather than by the requirements of shippers. Inherent in this approach is the payment by users of appreciable amounts of profit and the imposition of a burden which is not the cost of acquiring and maintaining the car used, but that of compensating the owner for income it might have received in a more profitable venture.[106] The proponents of this theory offered no evidence upon which any calculations might be based or per diem rates computed using the suggested method. There is, therefore, no way to measure the product.

During the 1954 hearings a plan was suggested by the Boston and Maine R. R. which involved the assignment of a different rate to each owner. The Long Island R. R., in 1954, suggested a method which, like Summary MT 2, in

[106] Underlying this theory is a concept of the function of car rental charges which goes beyond the statutory provision for compensation. It assumes that the charges should be so devised as to assure the nation of a freight car fleet of adequate total size and reliability, to motivate management to buy various types of cars as needed, to induce railroads to own cars to the extent that the national interest is served by their possession of such cars, to provide an incentive to fast turn-around of cars, and to compensate owners for "true economic costs" of ownership without imposing any unreasonable burden on users. See Exh. R 295, Page 5. It was the view of this witness that the adequacy of the supply of cars was an underlying question in this case and that "the idea of per diem is to induce private corporations voluntarily to tie up their capital in freight cars". These are all regulatory functions. They require the payment of profit by users; as might be expected, since there is little incentive to investment in the prospect of merely breaking even. The theory assumes the highly questionable proposition that net per diem creditors will voluntarily purchase the number and size of cars needed by the nation, without regard to their particular needs. It assumes value of use, rather than cost as a measure. If users are required to pay owners an element of profit on the value of the car for their proportionate part of its use, they are required to contribute greater amounts toward meeting the cost of the car than the owners.

volved the assignment of a different rate to each user. Neither was presented in sufficient detail or with such cost based analysis as to make possible any constructive evaluation, nor were they urged at the current stage of the case.

Southern Railway urges that the cost analysis be based on original costs, depreciating cars over a 14-year period using a double declining balance method of depreciation, and allowing interest on investment at 8 percent before taxes. Under this plan, rate changes would be related to the age of the car, rather than to its depreciated value. As proposed, the rate would change every four years for the first twelve, and after 14 years would drop to a permanent level applicable during the remainder of its use in per diem service. Rates vary between value groupings, based on original cost, which cover a range of $2,000, except the first which is from zero to $1,000. No provision is made for the cost of additions and betterments. A scale of rates constructed by Southern Railway and incorporating these factors, is shown in Table 12, below.

The Southern Railway analysis separates ownership costs into those referred to as variable, consisting of depreciation, interest, and property taxes on freight cars, and those referred to as constant, consisting of repair costs, depreciation, interest, and property taxes on repair facilities, payroll taxes, hire of freight cars,[10] and return on working capital. Amounts used for constant costs are those calculated by the Cost Section, based on the 1960 studies, except for an adjustment to reflect Southern's criticism of the cost of switching bad order cars. The total, divided by the active per diem car days for 1960, produces a daily "constant" cost of $1.44. Variable costs are measured by a table similar to Table 2, supra, which calculates depreciation, interest, and property taxes on the cars per $1,000 of original cost, but using the 14 year,

[10] Inclusion of 10.344 cents per active car day for this item appears to duplicate amounts included in the separately calculated charges for depreciation and interest on cars.

years. Reference to the Annual Reports on Transport Statistics in the United States, of which official notice is taken to the extent mentioned below, indicates that the cash payment on purchases of equipment varies widely.[107] In many instances there is no cash payment, while in others the payment exceeds 45 percent. In 1962 there were 13 instances where no cash payment was made, 10 instances of payments between 19 and 21 percent, and 5 in excess of 23 percent. The average for all districts was about 10 percent, but exceeded 27 percent in the Southern Region. Two carriers paid as much as 37 percent and 46 percent cash, respectively. Upon all the evidence, the Examiner finds that compensation to owners of cars requires that allowance for changes in the purchasing power of invested funds should be made with respect to 40 percent of the original cost of cars.[108] The remaining 60 percent should be treated as funds subject to repayment over the life of the car, in dollars of then current purchasing power, as to which the car owner suffers no loss of value.

The Cost Section studies developed that the average equipment obligations outstanding in the year 1960, assignable to ownership costs, totalled $1,537,312,286, on which had accrued a total of $59,164,994 in interest, indicating an average rate of 3.849 percent. The Examiner finds that compensation to owners for the interest element of the burden is accomplished by allowance of 6.62 percent interest before taxes on the unrecovered balance of 40 percent of the original cost of the car, and interest at 4.0 percent on the unrecovered balance of the remain-

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[107] Seventy-Sixth Annual Report on Transport Statistics in the United States for the year ended December 31, 1962, Table 146-A.

[108] This allowance includes consideration of the fact that, to the extent an owner must repay loans in 15 years, but collect per diem based upon a 30 year span, it necessarily incurs additional burden. See Appendix C.

ing 60 percent. Table 14, below, embodies these considerations and those discussed in preceding sections of this report, and indicates a method by which the investment cost per $1,000 of original cost may be calculated for application to cars of varying ages based on the cost index through 1961.

Changes in the rates applicable to a car over its operating life, accomplished by moving it from one value bracket to another on the basis of its current depreciated value have been considered above and found to be unreasonable. Changes based upon age of the car in service more nearly conform to the pattern of changes in ownership burden.[109] A system making use of the latter method places a car in a value bracket based upon its original cost, where it may remain. Since there is no progression downward through the bracket in such case, it is even more important that the value used to calculate the cost of each bracket closely approximate the cost of the cars therein. Necessarily, narrower brackets are required. The Examiner finds that brackets no more than $2,000 in width, as recommended by Southern Railway, with rates calculated upon the middle value of each, are adequate to satisfy this requirement. Table 15, following, translates the five year average annual costs from Column 12 of Table 14 into investment costs for six time brackets, and into value brackets having no more than $2,000 spreads. Rate changes experienced over the operating life of new cars will be substantially the same in number as under the present multi-level system, but will produce revenues which are related to the ownership costs. The Examiner finds that investment costs calculated in the manner set forth above will result in a fair and reasonable compensation to car owners for this element of the ownership burden.

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[109] Evidence of car leases with the Equitable Life Assurance Society between 1950 and 1962 show rates graduated with the age of the car, separated into five three year brackets and one 10 year bracket.

TABLE 14

| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Year in per diem service | Year Installed in Service | Return Subject To Index | Index[1] | Adjustment factor[2] | Adjusted Return[3] | Balance of Return | Interest on Col. 3 Balance[4] | Interest on Col. 7 Balance[5] | Property Taxes[6] | Total | Five Year Average |
| 1 | 1961 | 10.00 | 624 | 1.000 | 10.00 | 20.00 | 26.15 | 23.60 | 11.43 | 91.18 | |
| 2 | 1960 | 10.00 | 619 | 1.008 | 10.08 | 20.00 | 25.49 | 22.80 | 11.08 | 89.45 | |
| 3 | 1959 | 10.00 | 612 | 1.019 | 10.19 | 20.00 | 24.83 | 22.00 | 10.73 | 88.75 | 88.13 |
| 4 | 1958 | 10.00 | 594 | 1.050 | 10.50 | 20.00 | 24.16 | 21.20 | 10.38 | 86.24 | |
| 5 | 1957 | 10.00 | 562 | 1.110 | 11.10 | 20.00 | 23.50 | 20.40 | 10.03 | 85.03 | |
| 6 | 1956 | 10.00 | 516 | 1.209 | 12.09 | 20.00 | 22.84 | 19.60 | 9.69 | 84.22 | |
| 7 | 1955 | 10.00 | 468 | 1.333 | 13.33 | 20.00 | 22.17 | 18.80 | 9.34 | 83.64 | |
| 8 | 1954 | 10.00 | 450 | 1.386 | 13.86 | 20.00 | 21.51 | 18.00 | 8.99 | 82.36 | 82.22 |
| 9 | 1953 | 10.00 | 443 | 1.431 | 14.31 | 20.00 | 20.85 | 17.20 | 8.64 | 81.00 | |
| 10 | 1952 | 10.00 | 415 | 1.503 | 15.03 | 20.00 | 20.18 | 16.40 | 8.29 | 79.90 | |
| 11 | 1951 | 10.00 | 401 | 1.556 | 15.56 | 20.00 | 19.52 | 15.60 | 7.94 | 78.62 | |
| 12 | 1950 | 10.00 | 371 | 1.682 | 16.82 | 20.00 | 18.86 | 14.80 | 7.59 | 78.07 | |
| 13 | 1949 | 10.00 | 360 | 1.733 | 17.33 | 20.00 | 18.19 | 14.00 | 7.25 | 76.77 | 76.92 |
| 14 | 1948 | 10.00 | 343 | 1.819 | 18.19 | 20.00 | 17.53 | 13.20 | 6.90 | 75.82 | |
| 15 | 1947 | 10.00 | 320 | 1.950 | 19.50 | 20.00 | 16.88 | 12.40 | 6.56 | 75.34 | |
| 16 | 1946 | 10.00 | 300 | 2.080 | 20.80 | 20.00 | 16.22 | 11.60 | 6.22 | 74.84 | |
| 17 | 1945 | 10.00 | 254 | 2.457 | 24.57 | 20.00 | 15.56 | 10.80 | 5.87 | 76.80 | |
| 18 | 1944 | 10.00 | 254 | 2.457 | 24.57 | 20.00 | 14.90 | 10.00 | 5.52 | 74.99 | 74.44 |
| 19 | 1943 | 10.00 | 254 | 2.457 | 24.57 | 20.00 | 14.24 | 9.20 | 5.18 | 73.19 | |
| 20 | 1942 | 10.00 | 244 | 2.557 | 25.57 | 20.00 | 13.57 | 8.40 | 4.83 | 72.37 | |
| 21 | 1941 | 10.00 | 222 | 2.810 | 28.10 | 20.00 | 12.91 | 7.60 | 4.48 | 73.09 | |
| 22 | 1940 | 10.00 | 213 | 2.929 | 29.29 | 20.00 | 12.25 | 6.80 | 4.13 | 72.47 | |
| 23 | 1939 | 10.00 | 202 | 3.089 | 30.89 | 20.00 | 11.58 | 6.00 | 3.78 | 72.25 | 71.88 |
| 24 | 1938 | 10.00 | 194 | 3.216 | 32.16 | 20.00 | 10.92 | 5.20 | 3.43 | 71.71 | |
| 25 | 1937 | 10.00 | 194 | 3.216 | 32.16 | 20.00 | 10.26 | 4.40 | 3.08 | 69.90 | |
| 26 | 1936 | 10.00 | 182 | 3.428 | 34.28 | 20.00 | 9.59 | 3.60 | 2.73 | 70.20 | |
| 27 | 1935 | 10.00 | 177 | 3.525 | 35.25 | 20.00 | 8.93 | 2.80 | 2.38 | 69.36 | |
| 28 | 1934 | 10.00 | 165 | 3.781 | 37.81 | 20.00 | 8.27 | 2.00 | 2.03 | 70.11 | 71.10 |
| 29 | 1933 | 10.00 | 144 | 4.333 | 43.33 | 20.00 | 7.61 | 1.20 | 1.68 | 73.82 | |
| 30 | 1932 | 10.00 | 144 | 4.333 | 43.33 | 20.00 | 6.95 | 0.40 | 1.33 | 72.01 | |
| Over 30 | | | | | | | 6.62 | 0.00 | 1.16 | 7.78 | |

[1] Indices of Account No. 53, appearing in Schedule of Annual Indices for Carriers by Railroad, published by the Bureau of Accounts, Interstate Commerce Commission.

[2] Index figure (Col. 4) for 1961, divided by index for particular year.

[3] Col. 3 multiplied by Col. 5.

[4] Rate of 6.62 percent applied to mid-year balance based on $400.00.

[5] Rate of 4.0 percent applied to mid-year balance based on $600.00.

[6] Computed at 0.01163 times mid-year value based on $1,000.00, and assuming annual reduction in value at 3 percent after exclusion of 10 percent salvage value. Property taxes are assessed by the different states and municipalities on various bases, not all of which employ the value of the car. The Cost Section and the AAR analyses spread the total cost of such taxes over all cars evenly, while the Southern Railway method assigned them according to the depreciated cost of the car. The latter method has been employed in these tables. Allocation of total property taxes in the Cost Section 1960 study was made between car ownership costs and other expenses on the basis of undepreciated investment on an original cost basis. Similar distribution between cars of differing costs appears to be consistent with this approach and to embody the customary consideration in assessing such taxes.

NOTE: Columns 5 and 6 would require annual recomputation. Necessarily, the index for the current year must be estimated. Recent history of the index demonstrates that application of mathematical average movement would not produce reasonable results and that forecasting will be more reliable if an informed judgment is applied to the trend of the index to take into consideration existing and anticipated economic conditions.

TABLE 15

ANNUAL CAPITAL COSTS

| Years in Service: | Original Cost of Car: 0 to 1,000 | 1,000 to 3,000 | 3,000 to 5,000 | 5,000 to 7,000 | 7,000 to 9,000 | 9,000 to 11,000 | 11,000 to 13,000 | 13,000 to 15,000 | 15,000 to 17,000 | 17,000 to 19,000 |
|---|---|---|---|---|---|---|---|---|---|---|
| 1-5 | 88.13 | 176.26 | 352.52 | 528.78 | 705.04 | 881.30 | 1,057.56 | 1,233.82 | 1,410.08 | 1,586.34 |
| 6-10 | 82.22 | 164.44 | 328.88 | 493.32 | 657.76 | 822.20 | 986.64 | 1,151.08 | 1,315.52 | 1,479.96 |
| 11-15 | 76.92 | 153.84 | 307.68 | 461.52 | 615.36 | 769.20 | 923.04 | 1,076.88 | 1,230.72 | 1,384.56 |
| 16-20 | 74.44 | 148.88 | 297.76 | 446.64 | 595.52 | 744.40 | 893.28 | 1,042.16 | 1,191.04 | 1,339.92 |
| 21-25 | 71.88 | 143.76 | 287.52 | 431.28 | 575.04 | 718.80 | 862.56 | | | |
| 26-30 | 71.10 | 142.20 | 284.40 | 426.60 | 568.80 | 711.00 | | | | |
| Over 30 | 7.718 | 15.56 | 31.12 | 46.68 | 62.24 | | | | | |

| Years in Service: | Original Cost of Car: 19,000 to 21,000 | 21,000 to 23,000 | 23,000 to 25,000 | 25,000 to 27,000 | 27,000 to 29,000 | 29,000 to 31,000 | 31,000 to 33,000 | 33,000 to 35,000 | 35,000 to 37,000 | 37,000 to 39,000 | 39,000 to 41,000 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1-5 | 1,762.60 | 1,938.86 | 2,115.12 | 2,291.38 | 2,467.64 | 2,643.90 | 2,820.16 | 2,996.42 | 3,172.68 | 3,348.94 | 3,525.20 |
| 6-10 | 1,644.40 | 1,808.84 | 1,973.28 | 2,137.72 | 2,302.16 | 2,466.60 | 2,631.04 | 2,795.48 | 2,959.92 | 3,124.36 | 3,288.80 |
| 11-15 | 1,538.40 | 1,692.24 | 1,846.08 | 1.999.92 | 2,153.76 | | | | | | |

B—*Repair and Maintenance Costs.*

In calculating the total ownership burden, there must be added to the investment costs of the car an amount representing the cost of repairs and maintenance reasonably to be expected during the ensuing year. Prior to the calculations underlying the $2.88 rate, Account 314 repair costs had been estimated by the AAR using the costs of the latest available year. Beginning with that rate, and



again in the calculations underlying the multi-level rates, the average of Account 314 costs for the last five years, adjusted to current levels, was employed. Certain respondents challenge this procedure, pointing out that in each case, the result was a higher estimate than would have been produced by use of the latest year's data alone. Since the end sought was the approximation of the repair costs reasonably to be anticipated in the future, the use of an average of such costs over a recent period cannot be held unreasonable in principle. The record indicates, however, that this method did not produce reliable approximations of the anticipated repair costs.

Account 314 amounts for repairs over the period 1954 through 1963 are shown below, and demonstrate that frequent fluctuations occur in this item, making prediction difficult.[110] Differences, in some instances, are as much as twenty percent between two consecutive years.

TABLE 16

| Year | Account 314 | Approx. Change |
|---|---|---|
| 1953 | $631,414,135 | |
| 1954 | 497,291,943 | Down 21 percent |
| 1955 | 546,762,340 | Up 10 percent |
| 1956 | 572,110,661 | Up 5 percent |
| 1957 | 569,287,048 | Down ½ percent |
| 1958 | 467,793,875 | Down 19 percent |
| 1959 | 516,023,831 | Up 11 percent |
| 1960 | 488,898,352 | Down 5½ percent |
| 1961 | 438,620,793 | Down 10½ percent |
| 1962 | 451,807,303 | Up 3 percent |
| 1963 | 442,765,010 | Down 2 percent |

[110] Figures for Account 314 for Class I line-haul railroads, used by the AAR were introduced in evidence for the years 1954 through 1961. Official notice is taken of the figures for 1953, 1962 and 1963, respectively, as reported in Transport Statistics in the United States, Part I, Table 158 (1953) and Table 166 (1962-1963).

The 1954-1958 adjusted Account 314 average as computed by the AAR and employed in calculations underlying the $2.88 rate which became effective December 1, 1959, was $590,045,295. The actual amount subsequently developed by the AAR for 1959 was $516,023,831, and for 1960, the first full year in which the rate applied, the actual amount was $488,898,352. In 1961 the figure dropped to $438,620,793. The record shows that no combination of prior years would have produced an average reasonably close to the actual costs of the following year. Use of the 1958 figure alone would have resulted in an underestimate for both years but the discrepancy would have been much less. Differences between consecutive years are as much as $100,000,000 in some instances, however, indicating that single year costs do not necessarily furnish a reliable measure for following years. Since purely statistical solutions appear to be misleading, some measure of experienced judgment must be applied to the historical costs. The Examiner finds that, in determining whether rates for any following year should be revised, the repair costs to be anticipated should be estimated with reference to the costs of the latest available year, to the trend of such costs in recent years, if any, to the present and anticipated level of car demand, and to other relevant factors, rather than by strict employment of an average of such costs for a period of past years.

The calculation of repair and maintenance expenses for prior years to provide a basis for consideration is an accounting problem which may be solved in various ways, any of which might be considered reasonable provided the result was an equitable apportionment to ownership costs of all pertinent items. Disputes with respect to the calculation of some items, and the validity of certain apportionments, have heretofore been discussed. Prior to 1960, per diem ownership costs had not been made the subject of as extensive and detailed analysis as appears necessary. Future samplings and studies will undoubtedly pro-

duce greater accuracies. Employment thereof will depend largely upon whether the savings exceed the costs of the determination. Prescription by the Commission of a hard and fast method of calculation, which could be varied only after recourse to further proceedings, appears both uneconomical and inefficient. The method employed by the Cost Section in its analysis of 1960 data, however, is based upon the most recent information with respect to extent and allocation of the various items, and is embodied in summary form in a publication entitled Rail Form H, Formula for Use in Determining Per Diem Charges For The Use of Freight-Train Cars. This form, introduced in evidence as Exhibit R-5, is available to any interested person through the Bureau of Accounts of the Interstate Commerce Commission, and is summarized in Appendix B to this report. The Examiner finds that Schedules 1 and 2, and Summary T-1 through Column 3, contained in Form H, with certain deletions hereinafter mentioned, may appropriately be used to calculate the aggregate ownership costs for repair and maintenance of per diem cars.[111]

Form H is so designed as to permit the application of ratios and apportionments developed in prior years, to the data of the year under analysis. In its published form, it necessarily employs the factors developed from the special studies in 1960 and refers throughout to the 1960 base. While these factors may be used until replaced by more recent studies, the elapsed time is such as to require that such studies be made, and repeated at appro-

[111] The remaining columns of Summary T-1, and Summaries MT-2, and MT-3, have to do with the distribution of ownership costs among users, without distinction as to car values. In view of the findings in this report, they do not appear readily adaptable to a system of costs which vary by car value. While summary calculations were introduced showing costs on these bases, varying with value, no formulae were offered in the Form H style, to facilitate future calculations.

priate intervals. In this respect, the recommendations of the Commission's Cost Section deserve consideration. These include (1) Provision for separate reporting quarterly of per diem and non-per diem freight cars on line, (2) monthly counts of surplus per diem cars, separated between home and foreign cars, and (3) separating the report of line-haul car-miles of loaded and empty cars as reported in Schedule 531 of Railroad Annual Report Form A between home per diem cars, foreign per diem cars, and non-per diem cars. Particular care appears necessary to insure accuracy of the reports of surplus cars. The importance of up-to-date calculation of the car day divisor and the effect of unreliable reports on this figure have already been noted.

C—*Valuation of Cars.*

Classification of cars into nine value groups under the present multi-level rates is based upon their original cost plus additions and betterments, depreciated. The system here recommended calls for classifications into brackets based on their original cost, undepreciated.[111a] Where cars were built or rebuilt in the carriers' own shops, this base figure varies due to differences in accounting systems and the extent to which all costs associated with the construction were capitalized. Among the items sometimes omitted in first establishing the original cost were payroll taxes, vacation pay, holiday pay, health & welfare, shop and power plant repairs and maintenance, shop depreciation, etc. On May 6, 1963, the AAR issued instructions and reporting forms designed to adjust the original costs as first reported, so as to reflect the omitted items. These instructions and forms were revised by a second letter on June 25, 1963. The amounts reported in response thereto are referred to as "additives".

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[111a] Also including additions and betterments to date.

Since practices varied as to the items capitalized or omitted in the original reported cost, the instructions provided that each railroad was to determine which items had not been theretofore capitalized and submit additives only with respect thereto. No additives were permitted on additions and betterments accomplished subsequent to original construction of the car. Whether any claim for increased valuation was to be made was left to the option of the car owner. All revisions were subject to review and approval by the Cooperating Committee of Accounting Officers of the AAR. Form C provided for a report on each car, showing car initial, number, AAR mechanical designation, whether owned or leased, year installed and whether new, rebuilt, or second-hand, original cost plus additions and betterments undepreciated, adjusted original cost plus additions and betterments undepreciated, and per diem group applicable. Forms D and E provided for reporting of changes in value due to additives, as described hereinafter, for cars built in owners' shops and cars rebuilt in owners' shops, respectively. Forms D-1 and E-1, were provided as supplemental to Forms D and E, to show the details of the amounts added.

Instructions issued by the Cooperating Committee of Accounting Officers accompanied the distribution of Forms C, D, D-1, E, and E-1, and provided that additive amounts for payroll taxes, vacation pay and holiday pay should be computed by reference to the total capitalized labor cost using standard percentages developed by the General Managers Association for the year the car was built or rebuilt. Additives for interest on working capital were authorized at one percent of the total capitalized labor costs; for deadhead haul the additives prescribed were 6.06 percent of the direct material cost, capitalized; and, for interest on stock of capitalized material, the authorized additive was 1.50 percent of the direct material cost as capitalized. To the extent permitted by

carrier records, the additive for personal injuries was to be computed as an average of the preceding five years. If not possible, then the current year or an average of one or more of the preceding five years was permitted. Other additives were to be based upon the carriers' records, specific shop data being used when available and system averages otherwise. At the time of the hearings in these cases, no system of auditing had been instituted by the AAR to verify the accuracy of the reported valuations or corrections, although the subject was then under consideration. The Committee of Accounting Officers had, however, adopted a procedure, in instances where a reported valuation appeared too high or too low, of comparing it with a similar car reported by another carrier and striking an average of the two.

Southern Railway contends that the use of additives to increase the original cost figure is unlawful because not authorized by vote of the members of the Per Diem Agreement. It did not, however, specify the provision of the agreement which requires such a vote, and a review of the agreement reveals none. The agreement constitutes the General Committee—Operating-Transportation Division of the AAR, and the Board of Directors of that organization, as agents of the members to consider, inter alia, the desirability of changes in the rates of per diem. The Board of Directors is to determine what proposal, if any, for such a change shall be submitted to the members for vote. The decision rests solely in the judgment of the Board as determined by a majority vote of its members. In submitting the proposal, it is to transmit to each member the pertinent report or reports received from the General Committee, including minority reports. Following approval of a change by the members of the per diem agreement, the *Association* shall cause the same to be made effective, *taking all proper steps to that end.* Article 3(a) of the Plan of Organization of the Association of American Railroads provides that general

supervision and control of the affairs of the Association is vested in the Board of Directors.

The assignment of responsibilities and delegation of authority in such board and general terms necessarily confers upon the Board of Directors considerable scope for the exercise of judgment. Apparently Southern Railway does not contend that the original cost of cars built in carrier's shops should not include all proper elements of cost. It is not asserted that the report submitted to the members failed to indicate that original cost was to be used as the base for classifying cars into rate brackets. The decision of the Board of Directors to permit carriers to submit additional items of cost properly attributable to the cars, which had not been capitalized theretofore, for inclusion as part of the original cost, does not appear to be in excess of the authority granted by the agreement.

It is also contended that the system established by the AAR to revise the original capitalized cost of cars by use of additives lacks a uniform basis, lacks consistency with rational accounting policies and practices, and fails to provide an effective audit. It is said to violate accepted cost accounting principles and to introduce such error into charges under the multi-level rates as to render them unreasonable and unlawful. Most of the evidence offered in support of these allegations, however, is speculative and relies upon variations in reported percentages which could arise from rational as well as irrational causes. The fact that car values after adjustment by the inclusion of additives are higher than appear in original Form BV-588 reports to the Commission's Section of Valuation fails to establish any error in either. Form BV-588 is subject to revision during construction to reflect changes in costs. No meaningful inconsistencies were shown to exist in the instances cited. Generally, the original costs as reported on BV-588 and Form D-1 were the same. That railroads

vary in the amount of data reported on Form BV-588 is irrelevant to the accuracy of additive calculations. While wide variations appear in the percentages of labor costs submitted as additives between different carriers, it cannot be found that they stem from other than differences in the extent to which such costs were originally capitalized.[112] Differences in additives for overhead items can vary from year to year depending on the volume of work over which they are distributed. Conjectural calculations as to what could occur, or might be occurring in connection with the reporting of additives, can be accorded no probative weight.

Certain criticisms of the method established for calculation of additives appear justified. It is not clear that the labor items and material items on Form D-1 and E-1, which were used as the percentage basis for the additives, do not already contain some overhead items which could be repeated in the calculation of items 31 to 33 on the Forms employing predetermined percentages set in the General Managers Formula. Steps should be taken to detect and avoid errors appearing in the reports arising from transposition of figures and other causes. Appropriate studies are needed to ascertain the extent to which the uncapitalized costs should not be now added, due to their inclusion as operational costs of the year in which they were accomplished.[113] While some corrections, further study, and appropriate auditing of the reports are advisable, the indicated defects cannot be found so substantial as to invalidate the entire rate structure.

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[112] Variance in construction costs of cars as between different car builders would not seem unusual, in any event.

[113] To an indeterminate extent, such costs may enter into the base for calculation of repair and maintenance employed in setting per diem rates. Similarly, as much as 50 percent of such costs may be recovered in the year charged to expenses through reduction in income taxes.

It is argument, and some witnesses expressed the view, that car values might better be determined by independent appraisal, or by using the prices of equivalent cars built by independent car builders as a guide. Proponents of this method point out that owners who purchase cars pay more than those who build equivalent cars, and, based upon the higher reported cost, derive a higher per diem payment. This, however, would not warrant valuing the railroad built cars at a figure higher than their cost, since the function of the rate is to compensate the owner for his actual outlay, not for what the outlay might have been had he acquired the car in some other fashion.

In the initial phases of changing from a per diem system which gave no consideration to the cost of specific cars, to a system based directly thereon, certain procedures based upon the practical necessities of the situation cannot be avoided. It cannot be found that the method devised by the AAR for adjusting original capitalized costs of cars to reflect the addition of cost items which should have been included is unreasonable. Without doubt, it is capable of improvement and, as heretofore noted, there is under consideration the matter of auditing these reports. The problem exists primarily with respect to cars in the present fleet, since the original costs of cars built or rebuilt in the future will presumably have their full costs capitalized when reported. Of over one and one-half million cars, additives had been reported on 269,740 as of September 2, 1964. Newly built cars represented 226,872 of this number, and rebuilt cars some 42,868. Auditing, at least on a sample basis, appears feasible and certainly desirable in the interests of all carriers, both as owners and users. No reason appears, however, why all cost factors should not be considered in classifying cars in brackets whether the depreciated original cost is employed as in the present method, or according to their undepreciated original cost as herein recommended.

D—*Additions and Betterments.*

Certain improvements made to a car during the course of its service life, generally referred to as "Additions and Betterments", are treated as capital items rather than as current repairs. They are items of ownership burden which, because they occur at various times subsequent to the installation of the car in interchange service, require separate treatment. Prior to the institution of the multi-level rates, in 1964, the per diem rates and underlying calculations did not purport to reimburse the owner specifically for such costs. Very little evidence was introduced to assist the Commission in dealing with these costs, and the record suggests that owners have not been particularly concerned with obtaining reimbursement for them. Nor are they provided for in the per diem system suggested by Southern Railway in this proceeding. Clearly, however, they are as much a part of the cost of the car as the original construction cost. Adding these costs to the original base figure as in the present multi-level system fails to produce equitable compensation. Treatment of these costs as provided hereinafter, should be considered as interim in nature. Other methods of handling them, or evidence that it would be more economical to ignore them, should be brought to the attention of the Commission.

The cost of Additions and Betterment is substantially less than the original cost of the cars, since, beyond specified limiting amounts, the work results in rebuilding the car and the establishment of a new cost basis.[114] It appears, therefore, that a simplified method should be ade-

[114] Additions and betterments to 1,057 Southern Railway cars, of varying ages from three to 37 years, as of December 31, 1959, averaged $220.00. The highest average for a single group was $367.00, although, since not all cars may have received the same attention, costs on individual cars may be higher.

quate to provide compensation. Since the improvements may be made at any time throughout the operating life of the car, the period over which the cost should be recovered will necessarily vary. Ease of administration suggests that the period should end concurrently with the end of the 30 year period for recovery of other capital costs. Thus, for example, an addition made in the seventeenth year should be recovered over the following thirteen years. Interest on this added investment should be allowed at 6.62 percent, in similar fashion to that allowed on the original investment. The impact of property taxes, however, has necessarily been calculated in a quite general manner for per diem purposes, and an attempt to apportion such costs with respect to these relatively small expenditures seems a refinement of doubtful validity. The same is true with respect to allowance for changes in cost levels and allocations of a fraction thereof to mileage.

Table 17, below, shows the total cost of principal and interest at 6.62 percent of an expenditure of $100 over periods from five to thirty years, inclusive. The last five years have not been computed on the assumption that additions and betterments are less likely to be made near the end of the service life. They can be added if necessary. This table also shows the average cost per year for each period, and the indicated average cost per diem payable day, using 306 days. For practical purposes, the cost of a given addition or betterment, taken at the nearest $50.00, multiplied by the factor for the year accomplished, should present no great problem in computerized development of per diem credits and debits. Where successive additions or betterments are made the unrecovered balance of the earlier may be added to the most recent to establish the daily cost over the remainder of the life of the car.

TABLE 17

Average Cost per $100 of Additions and Betterments to Cars at Various Ages.

| Age A & B Made | Total Cost | Average Annual Cost | Average Cost (1) per diem payable day |
|---|---|---|---|
| 1 | $199.30 | $ 6.87 | 2.24 cents |
| 2 | 195.99 | 7.00 | 2.29 cents |
| 3 | 192.68 | 7.14 | 2.33 cents |
| 4 | 189.37 | 7.28 | 2.38 cents |
| 5 | 186.05 | 7.44 | 2.43 cents |
| 6 | 182.75 | 7.61 | 2.49 cents |
| 7 | 179.44 | 7.80 | 2.55 cents |
| 8 | 176.13 | 8.00 | 2.62 cents |
| 9 | 172.82 | 8.23 | 2.69 cents |
| 10 | 169.51 | 8.48 | 2.77 cents |
| 11 | 166.20 | 8.75 | 2.86 cents |
| 12 | 162.89 | 9.05 | 2.96 cents |
| 13 | 159.58 | 9.39 | 3.07 cents |
| 14 | 156.27 | 9.77 | 3.19 cents |
| 15 | 152.95 | 10.19 | 3.33 cents |
| 16 | 149.65 | 10.69 | 3.49 cents |
| 17 | 146.34 | 11.26 | 3.68 cents |
| 18 | 143.03 | 11.92 | 3.89 cents |
| 19 | 139.72 | 12.70 | 4.15 cents |
| 20 | 136.41 | 13.64 | 4.45 cents |
| 21 | 133.10 | 14.79 | 4.83 cents |
| 22 | 129.79 | 16.22 | 5.30 cents |
| 23 | 126.48 | 18.07 | 5.91 cents |
| 24 | 123.17 | 20.53 | 6.71 cents |
| 25 | 119.86 | 23.97 | 7.83 cents |

(1). Annual cost divided by 306 per diem payable days. Actual costs per year and per day would vary from the average in each instance to the extent required to meet cumulative interest costs of the difference between average and actual cost for the particular year, with lower payments during last half of each repayment period.

Southern Railway challenges the method of averaging the total cost of additions and betterments to a group of cars over all units therein, pointing out that not all may have received the same amount of work. It cannot be found, on the present record, that the more accurate analysis of the incidence of these costs would result in per diem revenue differences sufficient to justify the effort or render unreasonable the results produced by use of average figures.

## VIII—Distribution of the Annual Burden

The second major problem presented, after ascertaining the annual burden of the owner, is the manner in which it shall be shared by users of the car.[115] In the past, charges have been computed on the basis of a daily rate, a rate per mile of operation, and a combination of both. About 1867 a number of railroads agreed to a charge of 1¼ cents per loaded mile, which was later revised to ¾ cent per mile, loaded or empty, for cars of ordinary construction.[116] A combination time-mileage plan was attempted in New England in the early 1870's and a straight

[115] No small part of the interest in this second problem on the part of certain predominately terminating lines is due to the fact that they are net per diem debtors, and incur annually a substantial liability to other lines for per diem payments. That these lines occupy a difficult position cannot be denied and their inability to employ enough of their own cars to earn offsetting per diem credits locks them in that status. If, however, the per diem rates are fairly calculated and distributed, it cannot be found that they are contributing other than their fair share of the cost of the per diem fleet. The record indicates that, at least with respect to the Long Island Railroad, certain consideration has been given to its position in the division of revenues. Demurrage revenues which accrue to the terminating line furnish a partial offset to the per diem charges. With respect to the New Jersey & New York Railroad see *New Jersey & N. Y. R. Co.* v. *Erie R. Co.*, 318 I. C. C. 555, 562.

[116] Differences in the costs of cars apparently were recognized, since a rate of one cent per mile was charged for cars of special construction.

time basis employed for about two years in the same decade by two central-western carriers. See *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 374-375. On January 1, 1888, a mixed settlement basis of 15 cents per day plus ½ cent per mile was adopted by trunk lines generally but was abandoned after a few months. Thereafter the straight mileage basis of ¾ cent per mile was resumed, decreasing to 6/10 cents per mile in 1894. In 1895 The Car Service Committee of the American Railway Association recommended that the mileage plan be abandoned and a flat daily rate of 15 cents substituted. The plan was rejected, however, on vote of the members. In 1902, pursuant to a resolution of the Association, the Committee again submitted a per diem code, in the form of an agreement, which was adopted and which substituted a charge of 20 cents per day for the mileage charge. Since that time the charges have applied solely on a time basis, without reference to variations in the amount of use given the car by different users.

The 1902 Car Service Committee's recommendations set forth certain objections to the mileage rates, which included the inability to check the accounts of foreign lines as to actual mileage, lack of incentive to return cars promptly, and unevenness of compensation in different portions of the country. The advantages of the straight time plan were said to include the ability to exercise a complete check on the compensation due, the incentive to return the cars, and the uniformity of the rate. Although the Association voted to adopt the change, there existed several different views on this point, some advocating a composite time-mileage plan.

Where the burden is distributed on a time basis only (a daily rate without regard to mileage), maintenance of records and checking on reports by owners is simplified. At the same time, the maximum effect of the collateral force of these rates in encouraging the rapid return of

cars, is obtained. While the latter consideration is not proper for calculation of the owners burden, it is a factor of considerable practical importance which has been demonstrably present in the deliberations with respect to car rental charges for many decades. It should not be ignored when considering the equities of the methods by which charges are to be distributed. It appears probable, as hereinafter discussed, that distribution of costs with reference to the days foreign cars are held on line is the most practical and equitable method of spreading those costs which are related to time and those which should be absorbed equally by all users. To the extent, however, that particular costs vary among the users according to the amount of use given the car, equitable distribution is not accomplished by reference to days on line only. In addition, under present rules, bridge carriers which receive cars after midnight and are able to deliver them to a connection before the following midnight escape the payment of any car rental charge, although their division of the revenue from the movement may be substantial.

At the other extreme is the distribution of the owner's burden solely on the basis of the miles over which the car is moved. Because of the substantial difference in average daily line-haul movements of foreign cars among the respondents, use of this method produces unequal and unreasonable impositions of costs which are related only to time or which should be shared in more equal fashion. Use of this method also results in complete loss of the incentive to prompt return of cars.

The average distances active foreign per diem cars are moved by the different respondents vary widely. Thus, the special study data for 1960 indicated differences in the daily average line-haul mileages of more than 100 miles. A few of these are indicated below.[117]

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[117] Movements of particular scheduled trains of as much as 450 miles per day occur. Exh. R-280; Transcript 6964.

TABLE 18

| Carrier | Daily Average mileage[118] |
|---|---|
| L.I. | 4.8 |
| NY, NH&H | 34.6 |
| B&O | 44.5 |
| B&M | 51.2 |
| PRR | 51.3 |
| NYC | 51.8 |
| C&O | 53.9 |
| L&N | 59.5 |
| ACL | 62.8 |
| N&W | 66.6 |
| C,B&Q | 75.2 |
| Sou. Ry. | 70.4 |
| MP | 80.1 |
| NP | 81.4 |
| SP | 112.4 |
| ATSF | 113.2 |
| UP | 120.9 |

Clearly, the usage made of foreign per diem cars, measured in terms of line haul mileage of active cars, is so varied as to require separate treatment, if possible.

The evidence is insufficient to support any findings as to the precise results of distributing a portion of the ownership burden over the line haul mileage, but a comparison made by the Cost Section indicates that they would not be inconsequential. A number of Class I carriers would not, it appears, experience any radical change in their net per diem position. The impact on many, however, greatly exceeds the estimated additional costs of the

[118] Daily average line-haul car miles of foreign per diem cars from Exh. R-1, Schedule 4, Col. 2, divided by daily average, active foreign per diem cars on line from Summary MT-2, Col. 8.

system, hereinafter discussed.[119] The comparison in Table 19, below, is between the net debit or credit balance in 1960 under the then single rate of $2.88 per car per day, and the rates indicated in Summary MT-2. The latter are based upon average car value and average mileage of foreign per diem cars on each carrier, employing costs per day and per mile as developed in Summary MT-1 and converting the mileage cost for each carrier to a cost per day paid for, so as to produce a figure applicable to time only.

TABLE 19

| Carrier | MT-2 Figures Net Balance | $2.88 Rate Net Balance | Effect on Net Balance Result of use of mileage factor |
|---|---|---|---|
| AT&SF | Cr 509,494 | Cr 6,545,837 | — 6,036,343 |
| ACL | Dr 1,855,613 | Dr 361,825 | — 2,217,438 |
| B&O | Dr 200,554 | Dr 1,897,344 | + 1,696,790 |
| CRRNJ | Dr 2,087,207 | Dr 3,810,499 | + 1,723,292 |
| C&EL | Cr 1,022,051 | Cr 866,454 | + 155,597 |
| C&NW | Dr 320,418 | Dr 3,005,182 | + 2,684,764 |
| CMSP&P | Dr 74,247 | Dr 2,079,700 | + 2,005,453 |
| CRI&P | Dr 2,456,666 | Dr 2,186,162 | — 270,504 |
| CC&O | Cr 1,609,463 | Cr 2,278,921 | — 669,458 |
| C&S | Dr 779,404 | Dr 979,240 | + 199,836 |
| C&W | Dr 356,974 | Dr 655,637 | + 298,663 |
| D&H | Cr 935,112 | Cr 1,563,201 | — 628,089 |
| D&RGW | Cr 9,981 | Cr 1,139,820 | — 1,129,839 |
| DT&I | Cr 778,076 | Cr 65,353 | + 712,723 |
| EJ&E | Dr 697,219 | Dr 2,757,474 | + 2,060,255 |
| E-L | Dr 6,421,796 | Dr 5,344,185 | — 1,077,611 |

[119] As might be expected, most of the opposition to a system incorporating consideration of the mileage factor comes from carriers having high average daily car miles of foreign per diem cars and, conversely, the support therefor comes primarily from those with relatively low average daily mileages.

TABLE 19

| Carrier | MT-2 Figures Net Balance | $2.88 Rate Net Balance | Effect on Net Balance Result of use of mileage factor |
|---|---|---|---|
| GTW | Cr 223,245 | Dr 1,041,432 | + 1,264,677 |
| GM&O | Dr 1,456,263 | Dr 1,076,215 | + 380,048 |
| IC | Cr 4,674,432 | Cr 3,597,575 | + 1,076,857 |
| Ill. Term. | Cr 167,624 | Dr 333,089 | + 500,713 |
| KCS | Dr 577,863 | Dr 1,316,546 | + 738,683 |
| LV | Dr 1,573,061 | Dr 1,907,885 | + 334,824 |
| LI | Dr 1,296,050 | Dr 2,184,053 | + 888,003 |
| L&N | Cr 8,996,503 | Cr 9,260,093 | — 263,590 |
| MKT | Dr 1,466,540 | Dr 1,897,344 | + 430,804 |
| MP | Cr 1,122,793 | Cr 2,131,350 | — 1,008,557 |
| Monongahela | Dr 1,048,370 | Dr 1,797,206 | + 748,836 |
| NYC | Dr 6,555,778 | Dr 11,183,789 | + 4,628,011 |
| NYNH&H | Dr 3,646,721 | Dr 5,547,623 | + 1,900,902 |
| N&W | Cr 17,013,265 | Cr 18,372,614 | — 1,359,349 |
| PRR | Dr 11,534,062 | Dr 14,554,737 | + 3,020,675 |
| Reading | Dr 1,979,357 | Dr 3,502,707 | + 1,523,350 |
| SP | Cr 6,131,214 | Cr 9,944,190 | — 3,812,976 |
| Sou. | Dr 4,627,898 | Dr 1,621,175 | — 3,006,723 |
| UP | Dr 9,644,697 | Dr 2,052,293 | — 7,592,404 |
| WP | Dr 1,072,718 | Cr 45,467 | — 1,118,285 |

* Figures shown are dollars receivable (Cr) or payable (Dr). In last column (+) indicates amount by which carrier is benefited by the MT-2 calculation; (—) indicates amount by which carrier's liability is increased or credit decreased under the MT-2 calculation.

The figures as calculated for these comparisons were not offered as precise measures of the per diem status of the individual roads, but, as a reasonable approximation of the relationship of debits and credits between the two methods of per diem-charging. Since the comparison is with the single rate, rather than with the multi-level rates, the relationships shown furnish no support for precise findings with respect to the net effect of assigning a

portion of ownership costs to mileage, under a multi-value system, as compared to a straight time rate under such system. They do, however, warrant the conclusion that the consequence of taking the mileage factor into account can be expected to be of sufficient importance to justify its use.

While the divisions of through rates received by railroads pursuant to Commission orders or inter-carrier agreements furnish no measure of the compensation required to meet ownership costs of interchange cars, and may not be considered in ascertaining the burden of such ownership, they have not been held inappropriate for consideration when weighing the various ways in which the burden might be distributed. They furnish an indication of the benefit which users derive from the cars since the divisions which carriers receive are frequently based upon distance scales. Factors prescribed in Commission decisions for application to rate scales in ascertaining division increase with increases in distance.[129] As discussed hereinafter, line haul mileage has an appreciable impact upon reduction in car value and cost of repairs, both of which are factors entering into the car rental charge. Thus, on either basis, whether it be the enjoyment of greater revenues from the transportation of the car over longer distances, or the greater impact on the ownership burden resulting from such longer movements, the element of mileage is a significant factor which should be

[129] See *Divisions of Freight Rates*, 148 I. C. C. 457, 463; *Southwestern-Official Divisions*, 210 I. C. C. 687, 717; *Southwestern-Official Divisions*, 234 I. C. C. 135, 140, 163; *Divisions of Rates, Official and Southern Territories*, 234 I. C. C. 175, 224, 231 (App. D&E); *Official-Southwestern Divisions*, 287 I. C. C. 553, 593, 595 (App.); *Akron, C. & Y. R. Co. v. Atchison, T. & S. F. Ry. Co.*, 310 I. C. C. 351, 371 (App. C); *Official-Southern Divisions*, 287 I. C. C. 497, 547, 552.

reflected in the distribution of the annual burden among users of the cars.[121]

*A—Time Mileage Allocations—Repair of Freight Cars:*

The evidence warrants the conclusion that the use made of freight cars is comprised of and can be measured by their custody over a period of time, and their movement over varying distances. While it appears reasonable, in principle, to measure charges by assigning to each of these factors a portion of the total ownership burden, the evidence of record contains many divergent views as to the distribution between them. Certain respondents contend that depreciation of cars is solely a function of the lapse of time, while others assert that the use made of the car has a large and measurable influence on the extent of its depreciation. The various costs of maintaining and repairing the car were made the subject of a number of analyses which purported to show the proportions which were made necessary by line-haul movement, switching movements, loading and unloading, and the passage of time. Some 19 studies were made and offered in evidence. They demonstrate such divergent views as to suggest that a reliable separation of the causes of car repair costs is probably not possible beyond the broad classification between line-haul mileage and all other causes.[122]

The Cost Section adopted a separation of repair costs taken from Statement No. 7-63, *Explanation of Rail Cost Finding Procedures and Principles Relating to the Use*

[121] Assessment of an appropriate portion of the burden by reference to the line haul distance the car is moved would also eliminate in part the problem of the "no-day" cars, and require bridge carriers now avoiding contribution to bear a share thereof.

[122] Certainly a substantial overlapping of causal factors appears to be involved in producing a need for eventual repair work.

*of Costs*, issued by the Bureau of Accounts. It thus distributed repair costs 70 percent to mileage and 30 percent to time. The separation was developed by the Engineering Branch of the Section of Valuation as shown in the table below.

TABLE 20

| Line No. | Item (1) | Use portion (Percent) (2) | Time portion (Percent) (3) | Weighting (4) |
|---|---|---|---|---|
| 1 | Car wheels—15 yr. life | 100 | 0 | .11 |
| 2 | Axles (heat treated)—20 yr. life | 100 | 0 | .08 |
| 3 | Brake beams, heads, and shoes; couplers, dreft gears, etc. | 100 | 0 | .13 |
| 4 | Floors, sides, and ends | 70 | 30 | .22 |
| 5 | Door units, tracks and mechanism | 80 | 20 | .11 |
| 6 | Trucks, side frames, journal boxes and parts | 100 | 0 | .16 |
| 7 | Painting, blasting, stenciling | 20 | 80 | .10 |
| 8 | Wrecks and rough useage | 100 | 0 | .04 |
| 9 | Weather | 0 | 100 | .03 |
| 10 | Miscellaneous | 50 | 50 | .02 |
| | Composite | 79 | 21 | 1.00 |

As compiled, the use portion was intended to comprehend the impact of line-haul and switching activities and repairs made necessary by loading and unloading. The latter, included in Item No. 4, were reassigned to the time factor by assuming that 50 percent of that item covered such damage, resulting in a decrease of some eight percentage points in the use column,[123] and an equivalent

[123] Fifty percent of the seventy percent use factor for Item 4 is 35 which, multiplied by the weighting of .22 produces the eight percent change in allocation. The product was rounded to the 70/30 ratio used by the Cost Section.

increase in the time column. The weighting factors in column 4 for the first seven items were based upon data on file in the Engineering Branch. The last three were based on information contained in publications of the American Railway Car Institute, A.R.E.A. proceedings, and qualified by field information, conference of the Engineering Branch staff, and exercise of engineering judgment. All the percentage allocations in the first two columns are based upon engineering knowledge and judgment. As employed by the Cost Section, the portion assigned to "use" was treated as caused by movement of the car over miles of line haul and switching operations.

Additional analyses of the causes of car repairs, and their relative effect, were conducted by sixteen line-haul carriers[124] having a total ownership of some 720,415 per diem cars in 1960. The analyses were made separately by each participating carrier, with respect to its own equipment and experience. Analysis was made of the average annual cost of replacements or repairs to about 60 component parts of the cars considered, and distribution between those made necessary by line-haul mileage, switching, loading and unloading, and time, was accomplished by use of engineering judgment. The cars considered were 50 ton, 40' 6", single door, standard box cars, and, for each carrier, that type of gondola and open-top hopper car representing their largest percentage of

[124] Participating in this analysis were the Atchison, Topeka and Santa Fe Railway, Chesapeake and Ohio Railway, Chicago, Burlington and Quincy Railroad, Colorado & Southern Railway, Denver & Rio Grande Western Railroad, Great Northern Railway, Gulf, Mobile & Ohio Railroad, Illinois Central Railroad, Louisville and Nashville Railroad, Missouri Pacific Railroad, Nickel Plate Railroad, Norfolk & Western Railway, Northern Pacific Railroad, Seaboard Air Line Railroad, Southern Pacific Railroad, Texas & Pacific Lines, Union Pacific Railroad, Western Maryland Railroad, and Western Pacific Railroad.

ownership. The results of each carrier's analysis were weighted according to its ownership of the type of car and combined totals obtained, from which the following distribution of repair causes was developed:

TABLE 21

| | Road-Haul Miles | Switching Operations | Loading & Unloading | Time |
|---|---|---|---|---|
| Box Car | 37.205% | 21.095% | 26.184% | 15.516% |
| Gondola Car | 40.486% | 22.432% | 21.305% | 15.777% |
| Hopper Car | 36.580% | 21.019% | 16.114% | 26.287% |

If the above conclusions are averaged, the following result is produced:

TABLE 22

| Road Haul Miles | Switching Operations | Loading & Unloading | Time |
|---|---|---|---|
| 38.090% | 21.515% | 21.201% | 19.193% |

And if line haul and switching operations be combined, as well as loading and unloading and time, for comparison with the 70 and 30 proportions employed by the Cost Section, the comparable figures thus developed are 59.6 and 40.4, or, in round figures, 60 and 40.

While there is a superficial appearance of similarity in these average figures, a comparison of the 16 underlying studies reveals that it is coincidental at best. Set forth below are tables showing, for Box and Hopper cars, the proportions of repair costs ascribed by officials of the reporting carriers to the four mentioned causal factors. For box cars the combined ratios of line haul and switching to loading and unloading and time vary from 74/26 to 45/55. For hopper cars they vary from 85/15 to 37/63.

TABLE 23

**Hopper Cars**

| Carrier | Road Haul | Switching | Load & Unload | Time | Combined Ratio[1] |
|---|---|---|---|---|---|
| NY,C&St. L. | 35.428 | 21.138 | 19.748 | 23.686 | 57/43 |
| GN | 59.885 | 25.218 | 6.457 | 8.440 | 85/15 |
| D&RG | 51.163 | 27.076 | 10.808 | 10.953 | 78/22 |
| MP | 60.724 | 14.718 | 9.000 | 15.558 | 75/25 |
| WMd. | 39.296 | 28.097 | 21.760 | 10.847 | 67/33 |
| L&N | 46.560 | 20.693 | 5.051 | 27.426 | 67/33 |
| ATSF | 40.884 | 25.562 | 10.483 | 23.071 | 66/34 |
| UP | 34.889 | 29.246 | 20.207 | 15.657 | 64/36 |
| ACL | 43.086 | 19.516 | 16.415 | 20.984 | 62/38 |
| SP | 43.898 | 18.952 | 20.979 | 18.171 | 62/38 |
| GM&O | 40.185 | 20.786 | 8.668 | 30.361 | 61/39 |
| Ill Cent | 36.810 | 21.986 | 5.773 | 35.431 | 59/41 |
| C&O | 36.419 | 20.900 | 21.809 | 20.872 | 57/43 |
| CB&Q | 28.751 | 24.326 | 19.788 | 27.137 | 53/47 |
| SAL | 35.260 | 16.294 | 18.834 | 29.612 | 51/49 |
| N&W | 19.145 | 18.422 | 23.241 | 39.193 | 37/63 |

**Spread**

| | | | | | |
|---|---|---|---|---|---|
| N&W | 19.145 | | | | |
| MP | 60.724 | | | | |
| | MP | 14.718 | | | |
| | UP | 29.246 | | | |
| | | L&N | 5.051 | | |
| | | N&W | 23.241 | | |
| | | | GN | 8.440 | |
| | | | N&W | 39.193 | |
| | | | | GN | 85/15 |
| | | | | N&W | 37/63 |

[1] The first figure is the percentages of line-haul and switching rounded off. The second is composed of percentages for loading and unloading and time, also rounded off.

TABLE 24

**Box Cars**

| Carrier | Road Haul | Switching | Load & Unload | Time | Combined Ratio [1] |
|---|---|---|---|---|---|
| GN | 55.493 | 18.351 | 14.523 | 11.633 | 74/26 |
| MP | 54.065 | 15.253 | 12.584 | 18.098 | 69/31 |
| L&N | 40.800 | 22.890 | 21.981 | 14.329 | 64/36 |
| D&RG | 36.117 | 26.386 | 22.291 | 15.206 | 62/38 |
| CB&Q | 37.812 | 22.866 | 25.837 | 13.485 | 61/39 |
| Ill Cent | 40.516 | 20.836 | 24.143 | 14.505 | 61/39 |
| ACL | 37.467 | 22.572 | 19.985 | 19.978 | 60/40 |
| SP | 38.641 | 21.088 | 24.471 | 15.800 | 60/40 |
| GM&O | 35.650 | 23.183 | 27.660 | 13.507 | 59/41 |
| NY, C&St. L. | 36.207 | 23.196 | 28.389 | 12.208 | 59/41 |
| WMd. | 30.451 | 25.567 | 34.844 | 9.138 | 56/44 |
| C&O | 32.722 | 21.914 | 28.175 | 17.289 | 55/45 |
| SAL | 35.260 | 16.294 | 18.834 | 29.612 | 51/49 |
| ATSF | 30.191 | 19.596 | 34.197 | 16.016 | 50/50 |
| UP | 21.868 | 26.672 | 36.825 | 14.534 | 48/52 |
| N&W | 27.944 | 16.844 | 31.780 | 23.432 | 45/55 |

**Spread**

| | | | | | |
|---|---|---|---|---|---|
| UP | 21.868 | | | | |
| GN | 55.493 | | | | |
| | | MP 15.253 | | | |
| | | UP 26.672 | | | |
| | | | MP 12.584 | | |
| | | | UP 36.825 | | |
| | | | | WMd. 9.138 | |
| | | | | SAL 29.612 | |
| | | | | | GN 74/26 |
| | | | | | N&W 45/55 |

[1] The first figure is the percentages of line-haul and switching rounded off. The second is composed of percentages for loading and unloading and time, also rounded off.

A witness for the New York Central testified that a substantially greater proportion of the repair costs should be attributed to line-haul mileage, with relatively little allocation to time and switching. This witness did not, however, testify as to the exact proportions he considered appropriate. The Pennsylvania Railroad conducted a separate analysis of records concerning its 50 foot box cars, 70 ton gondolas, and 70 ton hopper cars, in which the repairs were ascribed to time, road-haul mileage, switching, and loading and unloading, separated according to three assumed conditions: (1) cars held on tracks without movement, (2) cars in road train service but without loads moving 20,000 miles per year for box cars and 10,000 miles per year for gondolas and hoppers, (3) cars in similar road-haul service but loaded and unloaded 18 times per year. In round figures, the result of this analysis was a distribution of 72 percent of repair costs to road mileage and switching, 11 percent to loading and unloading, and 17 percent to time.

Most of the above-described analyses of the various causes of repairs to cars were carried out by separate consideration of each portion of the car, the factors which cause wear or damage, and the relative extent of each. They were not, however, based upon tests or studies of equipment in operation under test conditions. The proportions assigned to the various causes were determined by the judgment of the engineering official or officials responsible therefor in each instance. The conclusions of the Section of Valuation represent the judgment of staff personnel in revising a similar allocation made in 1940, and published in Statement No. 4-54, November, 1954. Comparison of the individual judgments reveals appreciable and irreconcilable differences of opinion as to the cause of particular repairs and to the totals in each group. Even when the carriers are grouped by the broad geographical areas in which they operate, or their type of

service, no consistent pattern appears. No reason appears why any one of these judgments should be given greater weight than any other nor, with such widely divergent testimony, can more than general conclusions be supported.

It cannot be said that the contribution of any one of the participating carriers to the ultimate delivery of a car is more important than that of any of the others. Without the performance by each of its particular duty, the service would not be completed and none would earn revenue, whether or not it had performed its portion of the service. The switching necessary to move a car to and from its place of loading and unloading is an essential part of the overall service and of equal importance to all carriers who share the revenue. It is not disputed that using carriers bear themselves the cost of repairing damage which they cause by misuse of the car. No reason why all participating carriers should not share in the general, ownership costs which result from the shifting operations. The evidence demonstrates that it is an exercise in futility to attempt to segregate the loss in value and the repair costs generated by switching service from those generated by other causes. Reasons suggests that there is no need to make such a separation.[125] They should be shared by all users as equally as possible.

It is equally certain that repair costs, and loss in value of a car, resulting from damage done by the shipper or consignee during loading or unloading cannot be laid at the door of the originating or delivering carrier. The car is then out of their control. No reasons appears why they should bear a disproportionate share of these costs. Such costs are part of the ownership burden and arise out

[125] Car miles in switching service can only be estimated and the extent to which such service produces need for repairs as compared to line-haul mileage is not susceptible of proof. See footnote 128 below.

of the general performance of the entire service. They are also difficult to ascertain and isolate from other causes and should be shared equally by all users.

*B—Time-Mileage Allocations—Depreciation of Freight Cars.*

In its calculations of time and mileage charges, the Cost Section assigned 45 percent of depreciation to mileage and 55 percent to time. These proportions were developed by the Engineering Branch of the Section of Valuation, as were those for repairs, in connection with the computations underlying Rail Form A, and published in Statement 7-63, *Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs*. Like the similar distribution of repairs, it is based on judgment of the staff officials, rather than on specific tests. In developing the various percentages, the depreciation was first separated into a "use" portion and a "time" portion. The former purports to isolate that portion of depreciation attributable to the wear and tear due to running operations, switching operations, and loading and unloading operations. Subsequently, the loading and unloading portion was transferred to "time" and the remainder assigned as the mileage element of depreciation. All other was assigned to "time". The latter also purports to include depreciation resulting from the action of the elements and obsolescence. The distribution of the depreciation charges between use and time was accomplished by separating the tare weight of the car into 43 principal parts and assigning a portion of the weight of each part to one or the other factor. It was assumed that the relative weight of the parts approximated the relative costs for replacement of the parts. In developing the proportions, the weighted figures as calculated for box cars, hopper cars, and gondola cars were averaged. The result was 46.54 which was rounded to 45.55 for use in the cost formula. An example of this process is shown in Table 25 below.

TABLE 25

| Item— (1) | Total weight (lbs.) (2) | Use (per-cent) (3) | Time (per-cent) (4) | Use portion weight (lbs.) (Col. 2 x col. 3) (5) | Time portion weight (lbs.) (Col. 2 x col. 4) (6) |
|---|---|---|---|---|---|
| *Standard Steel Gondola Car* | | | | | |
| *Running gear group:* | | | | | |
| Wheels | 4,822 | 100 | 0 | 4,822 | 0 |
| Axles | 3,920 | 100 | 0 | 3,920 | 0 |
| Springs and snubbers | 774 | 60 | 40 | 464 | 310 |
| Journal box parts | 618 | 80 | 20 | 494 | 124 |
| Brake beams and heads | 470 | 50 | 50 | 235 | 235 |
| Brake shoes | 178 | 100 | 0 | 178 | 0 |
| Brake levers, connections, hangers, etc. | 253 | 50 | 50 | 126 | 127 |
| Couplers | 863 | 60 | 40 | 518 | 345 |
| Coupler yokes | 414 | 60 | 40 | 248 | 166 |
| Coupler operating devices | 47 | 80 | 20 | 38 | 9 |
| Air brake equipment | 683 | 50 | 50 | 342 | 341 |
| Pipe, fittings and clamps | 218 | 20 | 80 | 44 | 174 |
| Levers, rods, supports, etc. | 472 | 50 | 50 | 236 | 236 |
| Hand brake | 144 | 50 | 50 | 72 | 72 |
| *Undertrame group:* | | | | | |
| Truck side frames and journal boxes | 2,986 | 20 | 80 | 598 | 2,390 |
| Truck bolsters, center plates and side bearings | 2,196 | 20 | 80 | 439 | 1,757 |
| Center sills | 4,360 | 20 | 80 | 872 | 3,488 |
| Bolsters complete ) Under | 2,878 | 20 | 80 | 576 | 2,302 |
| Cross bearers ) frame | 2,718 | 20 | 80 | 544 | 2,174 |
| Cross ties ) | 1,100 | 20 | 80 | 220 | 880 |
| Draft gear, followers and carriers | 749 | 50 | 50 | 375 | 374 |
| Draft gear keys and retainers | 108 | 50 | 50 | 54 | 54 |
| Center braces, plates, etc. | 683 | 20 | 80 | 137 | 546 |

TABLE 23

| Item— | Total weight (lbs.) | Use (per-cent) | Time (per-cent) | Use portion weight (lbs.) (col. 2 x col. 3) | Time portion weight (lbs.) (Col. 2 x col. 4) |
|---|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) | (6) |
| *Standard Steel Gondola Car* | | | | | |
| *Body group:* | | | | | |
| Side construction | 12,591 | 50 | 50 | 6,296 | 6,295 |
| End construction | 2,389 | 50 | 50 | 1,195 | 1,194 |
| Floor construction | 7,505 | 80 | 20 | 6,004 | 1,501 |
| Inside stake pockets | 369 | 60 | 40 | 221 | 148 |
| Handholds, ladders, sill steps, etc. | 190 | 20 | 80 | 38 | 152 |
| Rivets and welding rod | 838 | 50 | 50 | 419 | 419 |
| Bolts, nuts, washers, cotters, etc. | 32 | 50 | 50 | 16 | 16 |
| Paint, oil and waste | 334 | 50 | 50 | 167 | 167 |
| Miscellaneous | 22 | 50 | 50 | 11 | 11 |
| Total tare weight of gondola car | 56,163 | | | 29,967 | 26,196 |
| Composite for gondola | | 53 | 47 | 29,766 | 26,397 |

[1] "Use" portion computed by dividing the figure of 29,967 pounds from column 5 by the total weight of 56,163 pounds shown in column 2, percent equals 53.36. This figure was rounded off to 54 percent and used. The remaining portion (47 percent) was chargeable to time.

[2] Figure of 29,766 used, being 53 percent of total tare weight of 56,163 pounds.

While the use of this allocation is supported by certain respondents, the validity of any allocation is challenged by others. No other evidence was offered respecting a proper method of apportioning depreciation between time and mileage. The distribution described above is founded in the opinion of staff officials and is not supported by any demonstrable tests or studies. It relies heavily on the assumption that there is a logical relation between the weight of the parts of a car, and the cost of those parts.

No evidence was offered to support this assumption, and in view of the differences which might be expected in the costs of labor and machining as between various parts, it is open to some doubt.[12] The analysis is, however, the only evidence of record on the point.

Depreciation for recording purposes is a function of the passage of time. It is an accounting device to explain the disappearance of funds expended for an asset and, in a sense, to require the asset to earn back its cost. It is accomplished by charging a portion of the cost of that asset, less its estimated salvage value, against income on an annual basis over a predetermined period of years. Insofar as depreciation for this purpose is concerned, it is immaterial how much or how little use is given the asset.[13] Depreciation, as used in these per diem calculations, however, has to do with the wearing out of the car, and is defined as that portion of the car's loss in value not made up by repairs credited to Account 314. The allocations of this loss in value between mileage and time were first calculated for use in Rail Form A, a formula designed to develop the out-of-pocket costs for various weight shipments moving in different types of cars over different lengths of haul, as a measure of the adequacy of rates to be charged shippers for the service. For this purpose, it was considered desirable to relate the disappearance of the value, in part, to the distance over which freight was moved, since the distance a carrier moves freight is a convenient and useful tool for measuring the relative costs, and rates, of the service.

It is contended that since regular repairs are made at current prices, freight cars do not lose value because of

[12] A value per pound system is also used, however, under AAR rules to settle certain claims for destroyed property.

[13] In some industries property depreciation may be based upon units of use. Such is not the case here.

physical deterioration, and the loss in value charged to depreciation is caused by obsolescence due solely to the passage of time. That a freight car can be kept in useable condition for extremely long periods of time by frequent repairs and careful maintenance does not alter the fact that at the time it is retired it has a salvage value which is only a small percentage of its original value. It cannot be found that repairs during its operating life bring it back regularly to the value and condition it possessed when new. The decision to retire a car, or group of cars, involves the balancing of a number of factors, and a determination as to whether more profitable future operations will result from expending funds to keep the cars in operation, or in expending such funds to purchase replacements. Inherent in the analysis is consideration of the physical condition of the car, the extent of deterioration, and the cost of keeping it in useable condition. The theory that no part of the loss in value of a car at retirement results from deterioration in its physical condition and ability to perform adequate service, due to wear and tear in use, cannot be accepted. Use of the term depreciation as a word of art in the accounting field, to mean a charge made on a time basis without regard to use, does not foreclose consideration of the causes of the loss in value.

Both the annual repair costs and the loss in value of the car not restored by such repairs are found to be directly affected by the use made of the car. That part of the use represented by line haul mileage is found to vary to such degree among users as to require separate assignment of such costs. Reference to Tables 23 and 24, above, reveals that the lowest estimate of the percentage of repairs caused by line haul mileage is about 20 percent. The average of estimates for all three classes of cars is about 38 percent, and the great majority of the estimates for this factor are between 30 and 40 percent. Estimates by

the Pennsylvania Railroad, and those used by the Cost Section, do not separate switching from line-haul but employ approximately 70 percent as the combined effect of these two causes. Although the repairs necessitated by switching service are considered, by most witnesses, to exceed those necessitated by line-haul service on a mile for mile basis, there is no agreement as to the extent of the difference. Equated car miles of per diem cars in switching service, as calculated by the Cost Section for 1960 was 2,114,616,465, while total line haul and equated switching miles were 23,790,915,732. The approximate 10 percent of equated switching miles suggests that about 63 of the 70 percent repairs assigned to the two causes was related to line-haul mileage. Both the Pennsylvania and the New York Central which, as noted, also estimate a high proportion of repair costs to line-haul, are proponents of the use of mileage as a measure of allocating the ownership burden among users. The sixteen respondents which joined in the studies summarized in Tables 23 and 24 are all opposed to this procedure. Certain of these respondents, however, estimated that line-haul mileage causes from 46 to 60 percent of repair costs. Upon all the evidence of Examiner finds that 50 percent of annual repair costs may reasonably be treated as related to the line-haul mileage over which the cars are moved.

In addition, some portion of the loss in value of a car over its lifetime must be ascribed to the deterioration resulting from the impact of line-haul movement. The Section of Valuation, as noted above, estimates the combined effect of line-haul and switching mileage produces some 45 percent of this loss. Considering the relationship between equated switching miles and total miles, this would suggest that approximately 40 percent was ascribed to the effect of line-haul mileage. No purpose would be served by attempting to resolve the dispute as to whether the accounting charge for depreciation may be treated as other than a purely time concept. It is doubtful that a

basis of separation of loss in value between time and use, as causes, could be reached upon which all interested parties could agree. Without regard to the manner in which record is kept of the annual loss in value of the car, it must be found that some portion thereof results from physical deterioration due to its use. On the record herein, and in the absence of persuasive evidence to the contrary, the Examiner finds that 40 percent thereof may reasonably be treated as related to the line-haul mileage over which the cars are moved.

Certain other allocations between the factors of time and mileage were made in Summary MT-1, which furnished the basis for subsequent calculations. This summary employed the same elements and total costs as did the calculation of costs based solely on time, and set forth in Summary T-1, but distributed them between factors of time and mileage, to produce a time cost per active car day, and a mileage cost per car mile, which included equated switching miles.[128] It did not adjust the time cost per active car day by the relationship between active days and per diem days paid for, as in Summary T-1, since Summary MT-1 was not designed to be used directly to establish costs. Summary MT-1 figures were subsequently used in Summary MT-2 and MT-3 for the latter purpose, and at that time an adjustment was made.

[128] "Equated switching miles" is an artificial figure which must be estimated due to the fact that records are not maintained of car mileages in switching movements. It was developed from data in Rail Form A, which indicated that, for each locomotive mile in switching service, there were 3.3 car miles. The mileage is then further increased by application of a "rough usage" factor of 2 to intended to represent the relationship of wear and tear on the car in switching service to line-haul service. The result is to increase locomotive miles in switching service 8½ times, to develop car miles in switching service. Validity of the "rough usage" factor was not shown. Apparently it is also based on "engineering knowledge and judgment."

In MT-1, assignments of cost to mileage and time were made as follows:

| | Mileage | Time |
|---|---|---|
| Freight car repairs and associated costs | 70% | 30% |
| Depreciation on cars | 45% | 55% |
| Depreciation on repair facilities | 70% | 30% |
| Property taxes on cars | 0% | 100% |
| Property taxes on repair facilities | 70% | 30% |
| Payroll taxes | 70% | 30% |
| Return on investment in cars | 0% | 100% |
| Return on investment in repair facilities | 70% | 30% |
| Hire of cars | 19.83% | 80.177% |
| Return on working capital | 59.012% | 40.988% |

The 20 80 ratio applied to hire of freight cars was developed by determining the combined ratio of depreciation and returned on cars. The 59 41 ratio applied to return on working capital was developed by determining the combined ratio of repairs; property taxes on cars and repair facilities, payroll taxes and hire of freight cars. The 70 30 and 0 100 ratios were employed according as the items were considered related or not to the apportionment of repair costs. It is contended that the allocation of any portion of depreciation, property and payroll taxes, return on investment, hire of freight cars, and return on working capital to mileage is erroneous, and that all are exclusively related to the passage of time. Attention is called to the fact that the Cost Section allocated property taxes on cars and return on investment in cars entirely to time, but failed to so treat the other items.

Nearly $49,000,000 expended for hire of freight cars was apportioned between mileage and time by use of the ratio produced by the relationship of the mileage and time totals for depreciation and return on depreciated

investments in freight cars. Some portion of the hire of these cars is measured by mileage but the record fails to show the extent thereof. The item, however, is related to, and to a large extent takes the place of an allowance of sums for depreciation and interest on such cars. Distribution of a portion thereof to mileage as accomplished by the Cost Section is found to be appropriate. In a multi-level system of rates, this item is covered by the allowance for interest and return of capital (or depreciation).

Separation of depreciation, interest, and taxes on repair facilities, taxes on wages and interest on working capital, between time and mileage because repair costs of cars are so separated, while perhaps appropriate in some instances, does not appear to result in a fair distribution of the costs here. Separation of ownership costs between time and mileage presupposes that the total amount necessary to compensate the owner has been determined. The separation, if accomplished, has as its purpose the equitable apportionment of the cost among the various users of the car, including the owner when it makes use of its own cars. If the various items of expense are to be apportioned in part to mileage because movement of the car over varying distances is a partial cause of the expense, then some logical causal connection should appear.

C—*Time Mileage Allocations — Depreciation of Repair Facilities.*

While the wear and tear from use may have some causal connection with the loss in value of repair facilities, it is much less apparent than with respect to freight cars. The former are long-term properties which would appear to be affected to a much greater degree by changes in machinery and equipment, and in the character of the cars and equipment requiring repair, than by wearing out of the facility in making the repairs. Assuming, however,

that the latter factor is significant, and that there is some relation between the need for repairs due to mileage and the wear of the facilities in making the repairs, the connection is too remote and conjectural for application here. Depreciation of repair facilities does not appear to have a measurable causal relation to the mileage of the freight cars. The passage of time which, because of innovations and changes in equipment and operations, eventually renders the facilities uneconomical, appears to be the primary cause of their loss in value.

D—*Time-Mileage Allocations—Interest on Investment in Repair Facilities.*

The Cost Section allowed, as interest on the undepreciated balance of the original cost of freight cars, 6.62 per cent before allowance for federal income tax. No portion of this was allocated to mileage as a causal factor. A similar allowance on the undepreciated balance of the original cost of repair facilities was separated between mileage and time on the same 70-30 basis used for repair costs. No apparent causal relationship exists between the distance freight cars move and the earnings derivable from the investment of funds in this, or other possible income producing properties. Certainly, if mileage has no such relationship to interest return on the cars themselves, there would appear little basis for finding a relationship to the identical type of cost of the repair facilities.

E—*Unit-Mileage Allocations—Property Taxes on Repair Facilities.*

In similar fashion, the Cost Section allocated property taxes on freight cars entirely to time, but allocated property taxes on repair facilities in the 70-30 proportions used for distribution of repair costs. There is no evidence that the property taxes vary with the amount of

repairs accomplished and, there being no causal connection with the amount of repairs, it is difficult to find any with the more remote factor of the cause of the repairs.

F—*Time-Mileage Allocations—Payroll Taxes.*

These comprehend railroad retirement and unemployment insurance taxes applicable to the ownership burden. There is no evidence that these taxes vary with the distance over which the freight cars are moved, nor in any established relation to the repairs resulting therefrom. While additional repairs may cause higher repair employment and consequent increases in these taxes, there is no basis for a finding as to the extent to which car mileage is a contributing factor. The taxes are based upon wages, paid upon a time basis, and should be borne by users on that basis.

G—*Time-Mileage Allocations—Return on Working Capital.*

Return on a fund of working capital was also apportioned in part to mileage. The proportion, in this instance, was developed by totalling the amounts assigned to time and mileage for car repairs, property taxes, payroll taxes, and hire of freight cars, and deriving a ratio therefrom. It thus represents an amalgamation of ratios of 70.30, 0.100, and 19.83 80.17, the last being itself the product of a prior amalgamation. It is difficult to perceive how this apportionment can measure the causal impact of mileage on the generation of the allowed return on the fund necessary as working capital, even if such a causal relation existed. As noted above, there appears no such connection between the distance freight cars move and the earnings derivable from invested funds. Interest income is customarily computed with reference to the amount of time involved, and should be so apportioned.

II—*Allocations to Time.*

While the use made of foreign per diem cars measured by line-haul mileage varies widely as between carriers, the length of time active cars are held on line appears more stable. Since nearly all lines perform both originating and terminating functions, and most act as intermediate, or bridge, carriers on various car movements, no reason appears why, in general, the average detention time should vary widely.[129] Little evidence was introduced on this point, but tests on the Long Island, a predominately terminating, and net per diem debtor road, indicated an average of about 9 days detention per car. Detention of foreign cars on the New York Central in 1960 also averaged about 9 days. A similar average was indicated by tests made in March and July, 1964, on the Atchison, Topeka and Santa Fe. A random sample of foreign car movements in March, 1964, on the Southern Pacific indicated an average detention of about 12 days. The latter two carriers are large originators of traffic and net per diem creditor lines. The Pennsylvania R. R. average for 1959-1963 was about 8.3 days. This evidence is insufficient to warrant a finding that the sharing of car use, insofar as the average time cars are held on line is concerned, is substantially the same for all carriers. The variations, however, appear much smaller than those involved in the average car mile factor and distribution of a portion of the ownership burden over the number of days the car is used may provide a more even sharing

[129] There are some exceptional situations. An example is that occurring in the assembling of bulk cargoes for further movement by water. Greater detention occurs in these instances, and allowance of greater free time is not unusual. Equitable sharing of the excess time in these cases could best be accomplished by special arrangements for per diem reclaims among the lines involved in the movements. Adjustment of divisions of revenue to take care of special situations is possible. *New Jersey & N. Y. R. Co. v. Erie R. Co.*, 318 I. C. C. 555, 562.

thereof. Costs which should be shared equally, and those which are unmistakably related to the passage of time, should be distributed on this basis. These include the remainder of loss in value and the remainder of repair and maintenance costs as heretofore listed.[139]

The ownership cost for cars of varying costs, according to the year built, may be approximated by adding to the appropriate investment cost from Table 15, the indicated average repair cost of $390.00. Of the total, the portion chargeable to mileage is represented by $178.00 of repair costs[140] plus 40 percent of the loss in value for the year. Table 26, below, assumes this loss to be $30.00 per $1,000, allowing a 10 percent salvage value and a 30 year life. The portion chargeable to the mileage factor thus becomes $12.00 per thousand dollars of original cost.[141] The total cost, less the portion ascribed to mileage, divided by

[139] It is urged that repairs made necessary by loading and unloading activities, and by switching operations, should be distributed over the mileage operated, on the basis that the cost would thus be spread in relation to the distribution of revenues. It is not contended that these costs are related to line-haul mileage, and the result would be an uneven and arbitrary imposition on this portion of the lading. The impact sought to be avoided by this theory is that due to the higher total days of detention over the years incurred by predominately terminating carriers. The particular problem of the latter, however, appears to stem most from their inability to earn offsetting per diem credits by use of their own cars that incur longer detention per car on line. Adjustment of the per diem charge to reflect this disability appears both improper in principle and of doubtful effectiveness.

[140] Taken from the 1960 analysis which indicated repairs cost of $356 per car and costs of depreciation, interest, and taxes on repair facilities, payroll taxes and interest on working capital of some $41 per car. One-half of the indicated cost of repairs is $178.00.

[141] This leaves assignable to mileage the increase resulting from providing for the effect of inflation, a cost not related to mileage.

and per diem payable days[1] produces the figures shown as time costs per day. The portion ascribed to mileage, in each case, divided by the indicated 1961 average of approximately 17,000 miles per car produces the indicated costs per mile of line haul movement.[2]

Subject to such further refinements as may result from future studies, it is found that the distribution of the ownership burden may be reasonably determined by annual calculation and separation of investment and repair elements as described above. Since the 1961 data is the latest available on this record, the ratios and assignments based thereon may reasonably be employed until more recent information becomes available. From El, Schedule 2, and Summary I-1, lines 14 through 18, provide a method of approximating the per diem payable days of foreign cars for more recent years, based upon the 1961 ratio. Equitable distribution of the total costs, however, requires that the ratio developed on Line 24 be multiplied by the total active per diem car days on Line 14, to develop the car day divisor. Table 20 sets forth the time and mileage rates which, using cost data through 1961, would reasonably have distributed the ownership costs among the various using lines, including the owners when acting as users of their own cars.

[1] The average per diem payable days over the period 1961-1963 inclusive.

[2] Average load mileage of all per diem cars for the 3 years 1961-1963 multiplied by 365 active car days.

> by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

While this issue seems not to have been squarely presented to the Commission in the proceedings which led to its 1955 decision, it was raised on appeal to the three judge court in Massachusetts and there held, one judge dissenting, that Section 1(11) of the Interstate Commerce Act imposes a duty on carriers to charge no more than reasonable compensation for the use of cars; Section 1(13) empowers the Interstate Commerce Commission to consider complaints alleging excessive car hire charges, Section 16 empowers the Commission to award damages for excessive charges, and that, therefore, Section 5(d) of the Administrative Procedure Act empowers the Commission to make declaratory orders with respect to past charges. Section 1(14)(a) was not considered since the complaint in Docket 31358 expressly disclaimed any intent to invoke action pursuant to that portion of the statute. On appeal, the United States Supreme Court did not find it necessary to pass on this issue, since the proceeding was being remanded to the Commission for further hearings. Thereafter, this defendant, together with the Boston and Maine and the New York, New Haven and Hartford, filed a motion to dismiss the complaint and to vacate the Commission's order of March 24, 1959, reopening the proceeding, on the ground, among others, that the Commission had no jurisdiction to promulgate or establish a rule relating to compensation payable for car-use effective retroactively for any past period. The motion was denied, and reconsideration thereof, requested

on the basis of the Supreme Court decision on May 18, 1959, in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, was also denied. It is apparent that any further consideration of the issue of jurisdiction with respect to past rates rests with the appropriate appellate courts.[144] As matters now stand, it must be ruled that the Commission has jurisdiction to make findings as to the reasonableness of past car rental rates.

In giving further consideration to the issues in Docket 31358, certain questions raised by the United States District Court require attention. These are:

1. The propriety of fixing the car-day divisor by reference to the average utilization of per diem cars over a period equal to the average age of all cars in the per diem fleet.

2. The propriety of rejecting original cost as a measure of depreciation and base for interest on investment, and the employment of reproduction cost for that purpose.

3. The propriety of subdividing Account 314, so as to separate and make possible the elimination from the calculation of per diem costs, those items unrelated thereto.

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[144] The Supreme Court dismissed the appeal "without prejudice to raising the 'adjudicatory' issue again, if it survives the further Commission proceedings." Section 1(14)(a), which seems to speak in futuro, apparently would not confer jurisdiction, even applying the principle indicated in *Hewett-Robins* v. *Freightways*, 371 U. S. 84, 87. If jurisdiction is not present, the Commission has not the authority to render an advisory opinion, even at the request of a Court in aid of proceedings pending therein. See *United States* v. *Garner*, 315 I. C. C. 139; 319 I. C. C. 383; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Company*, 341 U. S. 246, May 7, 1951.

4. The propriety of calculating car rental charges giving appropriate effect to both the time cars are held by users and the distance they are moved, that is, the time-mileage plan.

B.—*Car Day Divisor.*

Approximation of car usage to be anticipated in the future by reference to the average usage over recent past years cannot be considered unreasonable in principle. Choice of the past period to be used is largely a matter of judgment. The fixing of the past period, however, measured specifically by the average age of all cars in the fleet, is, as discussed earlier in this report, of extremely doubtful validity. Comments in Section II of this report with respect to approximation of utilization for future years are applicable here. For the purpose of measuring the reasonableness of the past rates this point seems of no great importance. The end sought in Docket 31358 is a determination as to the just and reasonable rate which should have been applied during each of the periods involved. It is not necessary to pass on the reasonableness of the decision to assess the challenged rates. Information is now available as to the utilization prevailing during the periods the challenged rates were assessed, some of which was made of record, and it is unnecessary to estimate the utilization or repair costs encountered. The issue today is not whether the AAR staff acted reasonably on the basis of information then available in estimating the ownership costs, but rather, on the basis of information now available, whether the estimates were in fact correct.

C.—*Reproduction Value Base.*

Consideration has already been given to the use of reproduction cost as a base for calculation of car rental charges and to the extent to which fairness to owners requires recognition of decreases in the purchasing power

of the dollar. The discussion in Section IV of this report is applicable here. As pointed out above, the use of a charge to depreciation based on the full cost of the car provides a measure of the owner's capital cost burden only if it has paid the full purchase price itself. Even if this were the fact, however, the evidence fails to establish that the increase in the owner's car rental income due to use of the estimated current cost of constructing the average car as a base in place of the original cost, bears any relationship to extra amounts needed to meet the ownership burden of its existing fleet. The evidence of record does not permit a determination as to whether owners of cars in the periods during which the single rates applied would have recovered more or less than their overall ownership burden, calculated on the actual cost of the cars, as a result of balancing of excess recovery on low cost or fully depreciated cars against inadequate recovery on high cost cars.

In fact, from 60 percent to 100 percent of the cost of cars is customarily obtained from lenders, and repaid over subsequent years in dollars of current purchasing power. Because of this, allowance for depreciation and interest using the reproduction cost of the average value car necessarily produced revenue per car more adequate to meet the ownership burden on cars of higher than average value than had been believed. At the same time, use of reproduction cost of the average car as a base for charges to depreciation and interest greatly inflated the excess recovery on cars of less than average value.[145]

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[145] On December 31, 1961, a sampling of 974,386 per diem cars out of a total of about 1,600,000 cars, indicated that 74 percent had a depreciated original cost of less than $4,000. Nearly 55 percent had a depreciated original cost of less than $2,000. These cars received per diem which included allowance for depreciation and interest based upon a reproduction cost, undepreciated, of $7,887, and a depreciated reproduction cost of nearly $4,400. Many of these cars were over 30 years old and had already been fully depreciated. Not only did they receive credit for depreciation and interest, but it was calculated on a substantially higher base.

The impact on the total ownership burden of various owners was obviously as varied as the average value and utilization of their fleets varied from the nationwide averages.

Notwithstanding the unreliability of the cost of the average car as a base to measure the compensation needed to meet the ownership burden in recent years, available records permit no other method for the past. There is a need, as discussed earlier, to reflect the change in purchasing power of the funds actually expended at earlier dates. It thus appears proper to apply the cost index to that portion of the original cost of the cars representing the actual investment of the owner. For reasons heretofore mentioned, it is found that 40 percent of the annual depreciation charge on an original cost base makes adequate provision for compensation to owners for this element of the ownership burden.

Depreciation charges on repair facilities have customarily been based upon undepreciated ledger value, although AAR calculations have been made on reproduction values for comparative purposes. The past rates here in issue, with one exception, were based on calculations which employed ledger value of these facilities to compute depreciation. All calculations since 1953 have employed ledger value, and no contention is made that any other base is essential to compensation of owners. The long life of these facilities and the fact that they are maintained by repairs at current prices, indicates that the original cost, or ledger, basis, is preferable.

Interest on the depreciated balance of the investment in both freight cars and repair facilities has been computed on varying bases in recent years. The calculations underlying the $2.40 rate used the average of depreciated reproduction value and depreciated original cost. Calculations underlying subsequent rates have used repro-

duction value. Computation of interest on this base was approved by the Commission in 1949, in *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I.C.C. 383, 392-393, and again in the prior report in Docket 31358. Apparently, the conclusion was based, in part, upon certain statements appearing in the 1909 opinion of the United States Supreme Court in *Knoxville* v. *Knoxville Water Co.*, 212 U.S. 1, 13-14. The comments there, however, had to do with the calculation of the value of the property devoted by the owners to the public service function, which was to be used as a base for determining a fair return. The present problem is not the calculation of proper charges to customers who bring new money into the industry which must meet the costs of operation, replacement, and provide for profits. It is, rather, the problem of assigning between and among a group of carriers engaged in multitudinous joint ventures, the burden of acquiring and maintaining the vehicles used by all. No movement of new money into the industry to provide for replacement is involved. The owner is to be compensated for the burden undertaken with respect to the car being used, to the same extent that the user would undergo such burden were it the owner.

The assertion that those who rent cars should expect to pay rentals based on present values ignores the fact that the relationship involved here is not that of a customer renting a vehicle from a lessor having no interest in the use to which it is put.[146] Railroads are not in the business of acquiring freight cars to rent to others. Value

[146] In the instance where a carrier makes use of a foreign car for movements in violation of the car service rules, it can more reasonably be said that it is "renting" the car. Conceivably, a higher charge would be appropriate in such instances but this is a problem having to do with penalty charges to enforce the car service rules, not with compensation to the owner for the ownership burden.

of use to either the owner or the user is not part of the criteria. All railroads have a joint and mutual interest in the cars owned and used in effectuating the services which they tender to the public. The concern here is to share equitably in the cost of acquiring and maintaining those cars, according as they are used, not in providing an independent lessor with sufficient income to enable it to replace its equipment and make a profit. The profits which flow into the industry as a whole, and which must be looked to for these purposes, are derived from freight charges made to shippers for the service.

No persuasive reason is shown why the invested amount upon which interest is calculated should be inflated by a cost index representing the approximate current cost of building the car. Comments with respect to this point made earlier in this report are equally applicable to the calculations for rates in prior years. The extra income produced by the use of the reproduction value base in calculating interest charges has not been shown to have a rational relationship to the costs of the cars in use. Basis for this charge should be the depreciated original cost.

*D—Account No. 314.*

The Uniform System of Accounts for Railroad Companies, prescribed by the Commission pursuant to Section 20 of the Interstate Commerce Act, provides, inter alia, for the recording of certain costs in Account No. 314, entitled "Freight-train Cars; Repairs." It is described as follows:

> "(a) This account shall include the cost of repairing freight-train cars and appurtenances, and the cost of repairing motor equipment affixed to freight-train cars engaged in transportation service; also cost of small hand tools used in repairs.

This account shall also include the net loss sustained on account of the destruction of foreign freight cars in the carrier's transportation service and amounts paid to others for repairs of freight cars for which the carrier is liable.

(b) A list of freight-train cars and appurtenances to such cars appears in property account 53, 'Freight-train cars.'"

The cars and appurtenances listed in Account 53 are as follows:

"Ballast (commercial)
Beer
Box
Cabin
Caboose
Charcoal
Coal
Dump (commercial)
Flat
Fruit
Furniture
Gondola
Gondola (hopper)
Gondola (long)
Gun truck
Hay
Lime
Logging
Oil tank
Ore
Platform
Poling
Poultry
Produce
Rack
Refrigerator
Stock
Tank and water (when used as commercial cars)

Air brake equipment, including hose.
Cooking equipment and untensils
Heating equipment
Ice boxes
Lamps and fixtures
Seats
Speed recorders
Train-signal equipment, including hose.
Water tanks."

Certain expenses, related to maintenance and repair, are recorded in separate accounts. These include such

items as superintendence, stationery and printing, and injuries to persons. The Uniform System of Accounts also contains certain explanatory matter with respect to the recording of maintenance expenses which provide in part as follows:

> "3-1 Items to be charged. (a) The accounts provided for maintenance . . . are designed to show the cost of repairs and also the loss through depreciation of the property used in transportation operations, including expenses resulting from ordinary wear and tear of service, exposure to the elements, inadequacy, obsolesence, or other depreciation, or from accident, fire, flood, or other casualty."

In *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I.C.C. 291, 300, the Commission observed that:

> "The Subcommittee on Mileage and Per Diem, in 1951, came to the conclusion that a proper per diem charge could be more readily determined if account 314 could be subdivided, and recommended that all the railroads do so beginning with 1952. The subcommittee found that there was 'considerable variation in the practices of various railroads in the charging of inspection costs as between account 314 and account 402.' It was of the view that 'it would be better if car repairs for cabooses could be eliminated from account 314 and caboose-car days eliminated from the freight-car day divisor.' The subcommittee also proposed that there be a separation of repair costs for home cars, foreign cars, and railroad and privately owned mileage cars, as well as cabooses, and a separate showing of cost of classified repairs, running repairs, switching expenses, and credits for sales of scrap. The

> general committee disapproved this recommendation because of the additional expense which would be required for such detailed accounting."

Pointing out that the recommendation of the subcommittee deserved further consideration, the Commission concluded that it was not desirable to delay its decision pending an effort to provide additional data and held that car-repair costs should be determined in the manner theretofore specified in its 1949 report. The District Court observed that while it might be within the Commission's competence to reject the recommendation in the interest of expedition,[147]

> ". . . we do think it should not have done so without a more thorough investigation and more detailed findings and analysis. If the recommendation deserved consideration it should have been considered, for there was ample evidence introduced to show the value of a break down of the account in reaching an accurate computation of per diem and also to show that such a break down was not impractical." 162 F. Supp. 289, 295.

Insofar as analysis of past per diem calculations is concerned, nothing can be accomplished by way of breakdown of these major repair accounts. Concededly, the multitudinous cost items entered therein over the years, without separation as to the sundry elements mentioned by the committee, are not now susceptible of separation. Sample studies conducted by the Cost Section in 1960 dealt with several of the mentioned separations, and the

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[147] Subsequent to this report a special committee of the AAR was appointed to study the recommendations of the sub-committee. It reported that the proposals for more detailed accounting were unwarranted refinements and not essential for the determination of freight-car ownership cost.

analysis based thereon took into consideration such of these factors as were considered significant. At most, the recorded totals of the past accounts can be separated by use of the ratios indicated in the 1960 studies, to the extent it appears that reasonably reliable results can be expected. For the future, analysis of Account 314 costs can be accomplished, either by use of appropriately designed random samplings of the data, or by more detailed reporting in the accounts. The record herein would not warrant a finding as to the precise form any such breakdown should take, nor as to the relative usefulness, cost, or practical accuracy, as between the two methods. A reasonably accurate measure of the significant costs, developed by either method, would appear acceptable.

*E—Time Mileage.*

The substantial difference in use of cars measured by line-haul mileage has already been considered. It has been found appropriate to assign a portion of the ownership burden to the line-haul mileage over which users move foreign cars. No records are now available with which to determine the actual mileages, by car, of foreign per diem cars on the defendants' lines during the periods the challenged rates were in effect and the only method shown on this record by which recognition might be given to a mileage factor in judging the past rates is of the type set forth in Form H as Summary MT-2.[148] This method may be employed to calculate a daily cost separately for each carrier, as well as an average for all carriers. It is contended that it will produce an appropriate measure of past rates if adjusted by the car repair deficiency.

Consideration was given to use of the car repair deficiency as a deduction from the per diem rates in Section

[148] A method similar to one suggested during the 1954 hearings by a witness for the Long Island Railroad.

3 of this report. It is the Examiner's opinion that it would be no more appropriate for application to past rates than for application to present or future rates. For the purposes of Docket 31358, however, it should not be considered in any event. As amended, the complaint seeks specific findings as to the just and reasonable rate, which findings may be considered by the United States District Court and the New York Supreme Court in assessing damages. If, in the opinion of those courts, there are legitimate offsets to the claims pending before them, the decision must be made by them. The per diem charge which is fair and reasonable must be measured by an equitable distribution of the total ownership burden. It exists independently of such offsets and must be found without reference to them.

In the calculations which follow, per diem costs have been computed on a time-only basis, and employed, in the first instance, for comparison with the AAR rates for the same periods, to provide a measure of the reasonableness and compensativeness of the latter. As to the great majority of the railroads which assessed and paid charges computed on the time-only basis, pursuant to their contractual obligation under the per diem agreement, findings on this basis are appropriate. The defendants having a present interest in Docket 31358, however, withdrew from the per diem agreement prior to the institution of the rates now in issue. They are entitled to separate findings as to their individual liabilities based upon that method of per diem cost calculation which most fairly distributes the ownership burden. Separate findings with respect to these parties which reflect, to the extent permitted by the evidence, their particular use of foreign per diem cars follow the findings on a time-only basis.

*F—Past Rates.*

(1) Discussion.

The record contains, in varying detail, the calculations made by the AAR staff based upon the periods July 1, 1955, to June 30, 1956, calendar year 1958, and calendar year 1961. As an aid to consideration of the past rates, there were introduced in evidence certain calculations based upon the T-1 formula in Form H, for the years 1953, 1956, 1959, 1961 and 1962.[149] Calendar 1960, the test year for the cost section studies, is also of record. The T-1 calculations were based upon the expenses and statistics for the particular years, using the original cost basis for depreciation and interest charges. Additional T-1 calculations were introduced which employed the reproduction cost basis.[150]

Both the T-1 calculations and those made by the AAR in support of the various past rates purport to calculate the ownership cost of freight cars at an average figure spread over all per diem cars for days of active use. Substantial variations occur, however, due to differences in the apportionments, methods used, and the basic data employed. To calculate the base for depreciation, the AAR multiplied the number of cars in per diem use, both owned and leased, by the average undepreciated reproduction cost, the latter figure having been obtained from the Commission's Bureau of Accounts, Section of Valuation. A rate of slightly over 3 percent was then applied to the total valuation to calculate the charge. The Summary T-1 calculations employ the Annual Report data for charges to depreciation plus an allowance for assumed depreciation on fully-depreciated cars. In place of using a de-

[149] Exhibits R-41, R-42, R-43, R-245, R-246. Only the daily figure was introduced for 1949 and 1951.

[150] Exhibits R-33, R-34, R-35, R-36.

preciation charge for cars leased from non-railroad owners, the T-1 method includes the payments made to such owners as shown in the Annual Reports, with minor adjustments. The total of the latter amount and the depreciation charges on per diem and non-per diem cars, converted to a reproduction base, would cover substantially the same cost elements as the AAR calculation. Where a single average rate is being calculated for all cars, the method used by the Cost Section appears the more accurate. In the revisions hereinafter made to the AAR calculations, the charges for depreciation of cars have been adjusted to eliminate certain apparent excess amounts, and so as to reflect recovery of 40 percent on a reproduction cost base and the remainder on an original cost base. Reasons for this treatment are discussed in Section IV and VII, supra.

The AAR estimated the deadhead haul cost of repair material, referred to by the Cost Section as non-revenue freight, by taking 6.06 percent of the total of the material proportion of the freight car repair proportion of general expense, maintenance of shop and equipment accounts, and the material portion assigned from Account 314. The percentage was based upon a study made in connection with Docket 17801, *Rules for Car-Hire Settlement,* 160 I.C.C. 369, while apportionment of the various accounts was based on studies made in 1956.[151] The Cost Section analyzed the 1960 annual report accounts to isolate expenses applicable to non-revenue freight and the cost per ton-mile of revenue and non-revenue freight. From the special studies, ratios were developed to estimate the ton-miles of non-revenue freight applicable to equipment

[151] The case cited was decided January 7, 1930, and the study was apparently between twenty and thirty years old during the period it was used by the AAR for the calculation of rates here in issue.

repairs, and the consequent cost. Further analysis of repair accounts in the Annual Reports developed the separation of this amount between ownership costs of per diem cars, and other costs.

Adjustments used by the AAR to Account 314 were based upon the returns to a questionnaire of August 14, 1956, covering operations for the twelve months ending June 31, 1956. One of these adjustments involved a reduction of from 64 to 66 percent of the total labor cost of train yard and interchange inspection, to eliminate costs resulting from inspection of private cars, foreign per diem cars, and that related to transportation activities. A further deduction of 1.46 percent of the total of Account 314 was made to reflect payments for foreign cars destroyed, less salvage. Labor and material charges for user responsibility repairs to foreign cars were deducted by use of an amount calculated at 2.73 percent of the total Account 314.

The Cost Section analysis included as ownership costs the inspection costs of foreign cars, and deducted the cost of repairs to home cars which were user responsibility. In the calculations underlying the $2.40 rate, based upon the 1952 data, the AAR employed 40 percent of inspection costs as the portion applicable to private cars, user costs and transportation activities. This was based upon the results of the 1947 studies. The Cost Section studies in 1960 indicated that some 45 percent should be so assigned.[152] Employment of 55 percent of the total labor costs of train yard and interchange inspection from Account 314 is found to assign a reasonable portion of inspection costs to the inspection of home and foreign cars. Although held to be appropriate for inclusion as ownership costs, inspection costs attributable to foreign cars

[152] Exh. R-1, Work Table 1, Sheet 2, Line 43, Cols. 6, 8 and 9.

were excluded in the 1949 and 1955 reports because of the finding that they had not been reimbursed by owners. As described above, in subsequent calculations the AAR also excluded such costs. The propriety of this deduction has been discussed in detail in earlier portions of this report. It is here found that all appropriate ownership costs should be included in calculating the car costs and the consequent rate, and that appropriate revision of AAR rules for reimbursement should be effectuated to eliminate any deficit in this factor for the future. For the past, as heretofore noted, if any offset is to be allowed for this factor, the decision lies with the Courts.

The Long Island R. R. points out that an adjustment in the percentage deduction of non-ownership costs from inspection costs should be made to eliminate the effect of including bad order and surplus cars in the calculation used by the AAR. Applied to the calculations for 1958, the result would be to increase the percentage of inspection costs assigned to non-ownership activities from 64.89% to 69.04%. As discussed above, however, this percentage includes the inspection costs of foreign cars, which should not be excluded. Application of the proportion as determined by the 1960 studies eliminates this criticism, and includes all proper inspection costs.

Deductions made by the AAR from Account 314 included 2.73 percent of the total, based upon the 1956 studies, representing the labor and material charges and voucher payments for repairs to foreign cars made necessary by unfair usage by the handling line. This deduction does not include any amount for handling line responsibility repairs by car owners, made on their own cars when acting as user thereof. Thus, while the per diem rate eliminated the cost of repairs due to unfair usage by users of foreign cars, it did not eliminate the cost of repairs due to unfair usage by the owner when using its

own car. Clearly, the cost of unfair usage repairs should be borne by the using line directly, whether the car is home or foreign. The 1960 studies indicated that 2.788 percent of Account 314 total repair costs arose from this source.[153] In the absence of other data, it is found appropriate to reduce the ownership costs for the 1956 and 1958 calculations by that percentage of the appropriate Account 314 figures.

Most of the other cost items employed by the AAR are apportioned to a large degree by use of the ratio that the adjusted amount of Account 314 bears to the total amount of equipment repairs. As a result, the correction of the adjusted figure produces changes in these other figures. When finally reduced to ownership costs per car per day, however, these changes are not substantial. The method used to apportion property taxes is substantially the same in both the AAR and Cost Section analyses.

Noting the distinction between user responsibility repairs made by users, and those made by others but paid for by the responsible users, it is contended that the AAR method of calculation failed to deduct from Account 314 appropriate amounts to cover the latter type. The AAR exclusion for this item was computed by taking 2.73 percent of the Account 314 total, based upon the 1956 study. Analysis of the 1960 Cost Section studies indicate that the deduction for that year would have been about 3.710 percent. Use of the latter percentage produces a reduction in the rates as calculated by the AAR of less than one cent per car day. In the absence of details of the 1956 study, it cannot be found that the deduction made by the AAR did not purport to include all proper elements, nor is the difference in result for past years so substantial as to require the conclusion that the percentage used was necessarily wrong.

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[153] Exh. R-1, Work Table 1, Sheet 2, Line 21, Col. 6, plus Sheet 3, Line 49, Col. 6.

By adding the cost of handling line-responsibility repairs and reimbursements for foreign cars destroyed charged to Account 314 by users, and the cost of handling line responsibility repairs charged to Account 314 by owners, and substracting the cost of reimbursements for foreign cars destroyed, a total amounting to 6.72713 percent of Account 314 for 1960 is obtained.[154] By comparing the exclusion of cost of all handling line responsibility repairs based upon this percentage with the amounts actually excluded in past AAR calculations, differences are shown which indicate the AAR deductions to be too low. The differences applied to the AAR calculations result in lower per diem costs of from 3.6 to 4.0 cents per car day. It is contended that the AAR calculations were in error to this extent on deductions for handling line responsibility costs. The 6.72713 percent includes 3.71 percent discussed in the last preceding paragraph, as well as train yard inspection costs amounting to about 0.229 percent of Account 314. Revisions made herein to the AAR calculations to include 55 percent of inspection costs as ownership responsibility, heretofore discussed, includes an allowance for the latter item. Similarly, inclusion of 2.788 percent of Account 314 to cover user responsibility repairs on home cars disposes of the remainder of this challenge.

While the Summary T-1 costs cover about 2½ percent less cars than those developed by the AAR, generally the total amounts for repairs and associated items are higher. A major cause of the difference is in the allowance for switching of bad order cars. The AAR added to Account 314 an amount equal to 1.24 percent thereof, based upon its 1956 study, to approximate the additional charges for this item which were recorded in other accounts. Summary T-1 for 1960 added the equivalent of

[154] All taken from the Cost Section analysis for 1960. Exh. R-1, Work Table 1, Page 53.

14.7 percent of Account 314 for this item. As heretofore noted, the calculation of this amount is the subject of some criticism. The remainder of the excess of the Summary T-1 calculations arise from larger allowances for items of general expenses, transportation expenses, maintenance of way expenses, and overheads, on the latter two. The content and method of evaluation of the 1956 and earlier questionnaires relied upon by the AAR are not of record, and it would be futile at this time to attempt a choice between them and the 1960 studies. It appears likely, however, that the 1947 and 1956 AAR studies become increasingly less accurate with the continuing changes in composition of the per diem fleet, traffic movement and volume, operating practices, etc. In similar fashion, the 1960 studies lose value as they are applied to more distant periods in the past. For the period from 1960 through 1963, during which the $2.88 rate applied, it must be found that the results produced by the 1960 studies are the most reliable and take precedence over inconsistent estimates developed through use of the older studies. For the periods 1953 through 1956 and 1957 through 1959, when the $2.40 and $2.75 rates were in effect, there is less basis for distinction, but the 1960 studies appear generally more accurate.[155] Subject to the above comments, it is appropriate to give consideration to the end results of both methods in estimating the ownership cost which should be used to establish the fair, just, reasonable, and non-discriminatory rate or rates which should apply throughout the periods in issue.

Testimony by experienced railroad witnesses suggests that the car day divisors employed in the past by the AAR have been overly optimistic. The matter has already

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[155] The studies relied upon by the AAR have been subjected to severe criticism by some parties. While they were not as detailed nor as closely supervised as the 1960 studies, they cannot be rejected in their entirety.

been considered in an earlier section of this report. The divisor based upon the AAR estimate of car utilization for 1960 included 473,083,857 car days used in the Cost Section analysis, plus 14,991,092 car days of foreign inactive cars, 310,119 Canadian and Mexican inactive car days, and 16,363,860 car days of non-per diem cars. In addition, by deducting only 73,093,494 car days for home surplus and bad order cars,[156] there was included in the divisor some 39,200,638 excess car days, for a total of 543,949,566. Since the AAR applied the average surplus and bad order car figure for each year to the total cars at the end of the year, rather than to the average in use during the year, to develop the utilization ratios which were then averaged, its method produces a divisor of about 542,000,000 active car days as the average of conditions during 1960. The Cost Section studies show that the ownership costs of 1,641,200 per diem cars in 1960 should fairly be spread over some 502,715,000 per diem payable days. The ownership costs of 1,685,910 per diem and non-per diem cars used in the AAR calculations therefore, should be spread over a proportionately greater number, i.e., about 516,000,000. These figures suggest that, for 1960, the car day divisor as calculated by AAR methods, was about five percent high. No appreciable change has taken place in the AAR method in the periods under consideration, and it may reasonably be concluded that past divisors were similarly over-estimated.

The complaints, as amended, seek specific findings for each and every month, at least through June, 1962. The record does not contain, nor, so far as appears, does the data exist, in such form as to make possible separate cal-

[156] Consisting of home bad order cars, 163,624 (132,597 by 1.234) plus home surplus cars, 36,085, (36,672 by 0.984), multiplied by 366 days. The Cost Section studies indicated a total of home bad order and surplus cars amounting to 112,294,132.

culations as to ownership costs on a monthly basis. Maintenance of records on an annual basis precludes any attempt to analyze the costs with relation to shorter periods, although findings obviously may be applied on a monthly basis. The evidential limitations in this case require that findings be confined to the average ownership costs over periods of more than one year. While these periods need not coincide with the periods during which the various challenged rates were in effect, the presentation of the evidence renders this the most practicable approach. Summary T-1 calculations have been introduced for years at or near the beginning or end of each such period, as well as for three of the four years of the 1960-1963 period. The three one-year periods chosen by the AAR as a basis for calculation of costs underlying past rate changes are situated, as shown in Table 28 below, generally near the middle of the period covered by a rate in issue. Thus, the twelve months ending June 30, 1956, comprise a period equal to about 30 percent of the time the $2.40 rate was in effect, situated in the latter half thereof. The year 1958 comprises over one-third of the period in which the $2.75 rate was effective and is situated in the middle of that period. The year 1961 covers one-fourth of the time the $2.88 rate was in effect, close to the middle of the period. Charges for depreciation and interest on cars, on an original cost base, show a continuous increase over the span of each period and, lacking better information, these generally centrally located years may be taken as reasonably representative of the average of such charges in each period. More fluctuation appears in the charges for payroll and property taxes, but the departure of the particular years from the average appears not unreasonable. The remaining two major factors, repairs and the car day divisor underwent appreciable fluctuation and can best be considered by use of the average figures for the period, in connection with the other costs of the test years as calculated by the AAR.

TABLE 28

| Year | AAR rate for period | Depreciation charge in MM | Interest charge in MM | Taxes in MM | Account 314 in MM | Average for period | Car day** div. in MM | Average for period |
|---|---|---|---|---|---|---|---|---|
| /*/ 1953 | | $163.1 | $201.9 | $87.1 | $631 | | 603.7 | |
| 1954 | | | | | 497 | | 581.9 | |
| 1955 | $2.40 | | | | 547 | | 569.0 | |
| [1955-56] | | | | 100* | 559 | (av) 552 | 578.3 | 579.5 |
| /*/ 1956 | | 176.9 | 222.5 | 99 | 572 | | 587.5 | |
| 1957 | | | | | 569 | | 601.6 | |
| [1958] | 2.75 | 196.7 | | 105* | 468 | 518 | 579.8 | 576.6 |
| /*/ 1959 | | 210.7 | 262.3 | 111.6 | 516 | | 548.4 | |
| /*/ 1960 | | 214.7 | 272.5 | 114 | 489 | | 540.6 | |
| /*/ [1961] | 2.88 | 219.9 | 274.4 | 108.7 | 437 | 455 | 524.4 | |
| /*/ 1962 | | 227.9 | 281.4 | 107.6 | 452 | | | |
| 1963 | | | | | 443 | | | |
| 1964 | Multi-Level | | | | | | | |

*—Taxes taken from T-1 calculations except where marked with asterisk. Marked figures taken from AAR calculations. In 1961 the AAR employed $102,580,751 as the total of property and payroll taxes.

**—Based on AAR calculation of average active cars as beginning and end of each year.

[ ]—Years for which AAR calculations were made.

/*/—Years for which T-1 calculations were made.

Data contained in the record permits the substitution in a number of the T-1 and AAR calculations of the charges for depreciation of cars based upon reproduction costs in place of those based upon original cost. Similarly, charges for interest on investment in freight cars may be adjusted to reflect an original cost base where necessary. The AAR calculations for 1958 and 1961 do not contain the data necessary to adjust the charges for interest on repair facilities to an original cost base, and Summary T-1 calculations must be relied on for this item, where possible. Summary T-1 calculations based on original costs, and as adjusted to allow charges for depreciation based upon 40 percent of reproduction cost and 60 percent of original cost, are reflected in Table 29, below.

TABLE 29 [1]

| Year | T-1 | T-1 (ADJ) | AAR Rate |
|---|---|---|---|
| 1949 | $1.75 | | $1.75 |
| 1951 | 1.68 | | 1.75 |
| 1953 | 2.12 | $2.15 | 2.00–2.40 |
| 1956 | 1.96 | 2.02 | 2.40 |
| 1959 | 2.44 | 2.53 | 2.75 |
| 1960 | 2.50 | 2.58 | 2.88 |
| 1961 | 2.58 | 2.67 | 2.88 |
| 1962 | 2.76 | 2.86 | 2.88 |
| 1963 | 2.78 | 2.86 | 2.88 |

(2) *The $2.40 Rate—1953 to 1957.*

This rate, which was in effect from August 1, 1953, to January 1, 1957, was supported by AAR staff calcula-

[1] The figures in this table do not reflect any deduction of a "repair deficiency." Calculations for 1961 and 1962 were introduced only upon an original cost basis. Depreciation charges on a reproduction cost basis for these years were estimated by increasing the original cost based charge in proportion as the 1960 original cost based charge bore to the 1960 adjusted cost based charge. See explanation below in re the $2.88 rate. No data was introduced for 1963. Figures on both the original and reproduction cost base for 1963 represent the application of an estimated 11 percent increase over 1960, as indicated by Cost Section testimony.

tions using cost statistics for the calendar year 1952. These indicated a cost for repairs and associated maintenance items of 121.05 cents per active car day; taxes of 14.334 cents; return on depreciated investment in freight cars and repair facilities, based on an average of original and reproduction costs, of 47.128 cents; and allowance for depreciation, based upon reproduction cost, of 56.222 cents. The total 1952 cost as thus computed of 238.73 cents per active car day was rounded to $2.40 for application after August 1, 1953. As heretofore noted, it is no longer necessary to rely upon the 1952 data since the record contains cost calculations for the twelve months ending June 30, 1956.[157]

The AAR calculations for this period, based on ledger value for all capital items, and employing car day divisors of 551,578,104 and 568,450,205 days, produced a daily cost of $2.05399.[158] The average car utilization factor, as computed by the AAR for the years 1954 through 1956, produces an average car day divisor of 584,851,360 car days. Earlier in this report the tendency of the AAR method of developing active car days to produce an inflated figure was discussed. Reducing the indicated average divisor for the three-year period by five percent produces approximately 555,608,792 per diem payable days per year over which the average annual costs for all cars should be spread.

Set forth below are the AAR calculations for 1955-1956, revised in accordance with the principles heretofore discussed. The average of Account 314 figures for 1954-1956 has been adjusted by eliminating the estimated cost of user repairs to home cars, and including the cost of

[157] As reported to the AAR by 89 railroads owning over 98% of total per diem cars.

[158] The AAR divisors were based upon the average car utilization factor for the 20 years, 1936-1955.

inspection of cars.[159] Interest on depreciated car value, interest on repair facilities, and depreciation on repair facilities have been included on the ledger value base, as shown in the AAR calculations. All other miscellaneous costs, including taxes, have been included as reported to the AAR for the purposes of the computation. These reports were made by 89 Class I carriers owning nearly 99 percent of the per diem cars, and the costs reported on this basis have been reduced to a daily figure by use of a divisor which reflects the number of cars covered by the reports. The adjusted amount for Account 314, and the amount allowed for depreciation on freight cars, having been based upon the total of all Class I carriers, have been reduced to a daily figure by a divisor which reflects the greater number of cars involved. Both divisors represent the average utilization for the period 1954-1956, as computed by the AAR, reduced by five percent. Appropriate adjustment of the car repair ratio to reflect the revisions of Account 314, would result in minor revisions of the miscellaneous items, but the evidence is not in sufficient detail to permit these calculations.

The reproduction value of cars used by the AAR to calculate the allowance for depreciation is based on reproduction costs as of December 31, 1955, using, however, the higher inventory of cars as of December 31, 1954, since that was the latest then available. The amount was

[159] Average Account 314 for 1954-1956 was $538,721,648. Deducting 1.46 percent as payment for foreign cars destroyed less salvage, 2.73 percent as labor and material charges and voucher payments for repairs to foreign cars account handling line responsibility, 2.788 percent as user repair costs on home cars, and 45 percent of labor cost of train yard and interchange inspection, and adding 1.24 percent of average Account 314 total to cover switching expense, produces $465,497,200. The labor cost of train yard and interchange inspection was estimated by taking the average freight train car miles for the period 1954-1958, of 30,520,798,000 times the average inspection cost for September 1956 of $3.08 per 1000 car miles.

also increased by 8.5 percent to reflect estimated cost increases between 1955 and the date of the AAR calculations. Cars owned or leased, including cabooses, at the end of 1954 were 1,757,731, compared to 1,719,951 at the end of 1955. The cost index increased from 450 in 1954 to 468 in 1955. Use of the higher costs as well as the higher number of cars produced an overstatement of the allowance for depreciation. Further overstatement results from failure to deduct any salvage value. The allowances for depreciation of cars, based upon reproduction value, together with the amounts allowed for hire of freight cars in the Summary T-1 calculations for 1953 and 1956, total approximately $260,000,000 and $297,000,000, respectively.[160] These latter must be taken as more reliable measures of this charge.

This charge, based upon depreciation enlarged by application of the cost indices to the entire original cost, gives no recognition to the lesser costs arising from financing of car purchases. For the purposes of the present calculation, it has been reduced to reflect use of a base comprised of 40 percent of the original cost raised to a reproduction level, and 60 percent of the original cost unchanged.[161]

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[160] Hire of freight cars plus recorded depreciation on all freight cars, plus allowance for normalized depreciation on all fully-depreciated cars. Thus, for 1953, from Exh. R-33, page 2-A, $249,707,090 plus ⅓ of 1 percent to allow for normalized depreciation on non-per diem cars, plus $9,431,201 for hire of freight cars. For 1956, from Exh. R-34, page 1, $266,959,333 times 100/96 to include depreciation on non-per diem cars, plus ⅓ of 1 percent to allow for normalized depreciation on non-per diem cars, plus $18,254,405 for hire of freight cars. To be more strictly accurate, the amount for Hire of Freight Cars should be apportioned between depreciation and interest, but the record contains no basis for such a separation. It does not appear that appreciable error results from use of the amount in the fashion shown.

[161] Summary T-1 for 1956, using 40 percent of unit cost of 44.140, and 60 percent of unit cost of 29.249, produces adjusted unit cost of 35.205. Ratio of latter to 44.140 applied to $297,000,000 results in charge of $236,700,000.

TABLE 30

| | Item | Amount | Per Day (3) | Comments |
|---|---|---|---|---|
| 1 | Car Repair | 465,497,200 | 83.783 | Average of Account 314 for 1954-1956, adjusted. (1) |
| 2 | Prop. & Payroll Tax. | 100,040,023 | 18.246 | (2) |
| 3 | Car Depr. | 236,700,000 | 42.602 | At 3.08 percent of reproduction value. (1) |
| 4 | Int. on Cars | 196,167,412 | 35.779 | At 6 percent on depreciated ledger value. (2) |
| 5 | Depr. Rep. Fac. | 8,717,211 | 1.590 | Based on undepreciated ledger value, as reported. (1) |
| 6 | Int. on Rep. Fac. | 15,794,417 | 2.914 | At 6 percent on depreciated ledger value. (2) |
| 7 | Misc. Main. of Equip. Accts. | 43,669,996 | 7.965 | (2) |
| 8 | Main. of Rep. Fac. | 27,489,127 | 5.014 | (2) |
| 9 | General Expense | 30,759,352 | 5.610 | (2) |
| 10 | Deadhead haul | 14,484,188 | 2.642 | (2) |
| 11 | Int. on stock of Rep. Materials | 3,585,195 | 0.654 | (2) |
| 12 | Int. on Working Cap. | 3,152,232 | 0.575 | (2) |
| Total | | | 207.374 | |

(1) Divisor 555,608,792 per diem payable days, using 1954-1956 average utilization per AAR, less five percent.

(2) Divisor 548,274,756 per diem payable days, using 98.68 percent of the divisor in (1), to reflect the lesser number of cars of the 89 reporting railroads. This percentage represents the ratio on December 31, 1955, of cars owned by the reporting carriers to total cars.

(3) Cost per diem payable day stated in cents.

Cost calculations for 1953 and 1956, using the Summary T-1 formula provided in Form H, were offered in evidence, using both original cost and reproduction cost bases. By substituting 40 percent of the allowance for depreciation on cars at the reproduction cost level and 60 percent of the allowance based on original cost in the calculations based upon original cost, totals of $2.15 and $2.02 per day, respectively, are obtained. Table 28, supra, indicates that, while per diem payable days in 1956 were some 16,000,000 less than 1953, the charges to Account 314 were also nearly $60,000,000 less. Both of the intervening years experienced per diem payable days and charges to Account 314 which were less than either 1953 or 1956. An average rate of $2.08 is indicated by the Summary T-1 calculations for the 1953-1956 period.

The Examiner finds that the just, fair, reasonable and non-discriminatory rate proper as a daily charge to subscribers to the per diem agreement for the use of per diem freight cars in and during each and every month from August, 1953, through December, 1956, inclusive, was $2.08.

(3) *The $2.75 Rate—1957 to 1959.*

This rate, which was in effect from January 1, 1957, to December 1, 1959, was supported by AAR staff calculations using cost statistics for the twelve months ending June 30, 1956. These indicated a cost for repairs and associated maintenance item of 114.28 cents per active car day; taxes of 18.137 cents; return on depreciated investment in freight cars and repair facilities, based upon reproduction costs, of 72.06 cents; allowance for depreciation of freight cars, based upon reproduction costs, of 61.48 cents; and allowance for depreciation of repair facilities, based on original cost, of 1.58 cents. The total mid-1955 to mid-1956 cost as thus computed, 267.54 cents per active car day, was adjusted to reflect 1956 cost increases, resulting in a figure of 276.96 cents, which was rounded to the $2.75 rate. The costs for this period may

now be assessed by reference to the actual experience for the year 1958.

The AAR calculations for 1958, based on reproduction cost both for depreciation of freight cars, and for return on depreciated investment in cars and repair facilities, using divisors of 579,865,344 and 583,499,222 days, produced a daily cost of $2.63801.[162] The average car utilization factor as computed by the AAR for the years 1957 through 1959 produces an average car day divisor of 574,849,036 days. Reducing this indicated average divisor for the three year period by five percent produces approximately 546,106,584 per diem payable days per year over which the average annual costs should be spread.

Set forth below are the AAR calculations for 1958, revised in accordance with the principles heretofore discussed. The average of Account 314 figures for the years 1957-1959 has been used, after adjustment to eliminate the estimated cost of user repairs to home cars, and the inclusion of cost of inspection of cars.[163] Interest on depreciated investment in cars, has been estimated by taking 6 percent of the condition percentage of 55.5 percent of the undepreciated ledger value as of December 31, 1958. Depreciation on repair facilities has been included on the ledger value base, adjusted to reflect changes in the repair ratio due to revisions of Account 314 for 1958.[164]

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[162] This amount reflects the use of 1958 repair costs. The AAR divisors were based upon the average car utilization factor for the 20 years 1939-1958.

[163] Average Account 314 for 1957-1959 was $517,701,585. Deductions and additions as set forth in Footnote 159, supra. The labor cost of train yard and interchange inspection was estimated by taking the average freight train car miles for the period 1956-1958 of 30,562,113,000 times the average inspection cost of $3.50 per 1000 car miles, as of 1958. Account 314 for 1958 was similarly adjusted to provide a basis for correction of the freight car repair ratio used to allocate other items.

[164] All of the miscellaneous items, other than No's. 1, 3, and 4, are affected to some extent by changes in the repair ratio.

Interest on repair facilities has been included at 6 percent of the depreciated reproduction value. As heretofore discussed, the basis for this charge should be the original, or ledger, value, but the record does not contain sufficient data to revise this figure. All other cost items have been included as used by the AAR for 1958, adjusted to reflect the change in the repair ratio. A divisor of 546,106,584 days has been used to reduce the car repair charge to a daily figure, based upon the average utilization for 1957-1959, to conform with the similar base used to calculate the amount. A divisor of 554,324,261 days has been used to reduce all other charges to a daily figure, based upon the average utilization during the year 1958.

The allowance for depreciation on cars used by the AAR was calculated by multiplying the average undepreciated cost on a reproduction base, of $7,887, as of December 31, 1958, by the total of 1,743,484 cars owned or leased on that date, taking 3.09 percent thereof. No deduction was made for salvage value. As has been noted above, where a single average rate is calculated, the method used by the Cost Section appears to furnish a more reliable measure of such charges. Summary T-1 calculations for 1959 and 1960, with depreciation on cars revised to a reproduction cost basis, plus amounts allowed for hire of freight cars, indicate approximate costs of $366,000,000 and $379,000,000, respectively.[165] The comparable figure from the T-1 calculation for 1956 is $297,000,000. The 1959 figure must be taken as the more reliable measure of this charge. As in the last-described calculation, it has been reduced to reflect use of a base comprised of 40 percent of the original cost raised to a reproduction level, and 60 percent of the original cost unchanged.[166]

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[165] Calculated as described in Footnote No. 160, supra, using Exhibits R-35 and R-36.

[166] Summary T-1 for 1959, using 40 percent of unit cost of 62.545, and 60 percent of unit cost of 41.351, produces adjusted unit cost of 49.828. Ratio of latter to 62.545 applied to $366,000,000 results in charge of $291,580,000.

TABLE 31

| | Item | Amount | Per Day(5) | Comments |
|---|---|---|---|---|
| 1 | Car Repair | 439,840,509 | 80.542 | Average of Account 314 for 1957-1959, adjusted.(1) |
| 2 | Prop. & Payroll Tax. | 102,743,728 | 18.535 | (2) |
| 3 | Car Depr. | 291,580,000 | 52.781 | At 3.09 percent of reproduction value.(2) |
| 4 | Int. on Cars | 239,742,628 | 43.249 | At 6 percent on depreciated ledger value.(2)(3) |
| 5 | Depr. Rep. Fac. | 8,611,797 | 1.554 | Based on undepreciated ledger value.(2) |
| 6 | Int. on Rep. Fac. | 40,165,191 | 7.246 | At 6 percent on depreciated reproduction value.(2)(4) |
| 7 | Misc. Main. of Equip. Accts. | 45,942,162 | 8.288 | (2) |
| 8 | Main. of Rep. Fac. | 20,450,244 | 3.689 | (2) |
| 9 | General Expense | 30,000,575 | 5.412 | (2) |
| 10 | Deadhead Haul | 11,020,858 | 1.988 | (2) |
| 11 | Int. on stock of Rep. Materials | 2,727,935 | 0.492 | (2) |
| 12 | Int. on Working Cap. | 2,629,663 | 0.474 | (2) |
| Total | | | 224.250 | |

(1) Divisor 546,106,584 per diem payable days, using 1957-1959 average utilization per AAR, less five percent.

(2) Divisor 554,324,261 per diem payable days, based upon 1958 average per AAR, less five percent.

(3) Ledger value, undepreciated, December 31, 1958, was reported as $7,199,468,315. Using reported condition percentage of 55.5 percent produces a depreciated ledger value of $3,995,710,465.

(4) The record does not permit revision of this figure to an original cost basis.

(5) Cost per diem payable day stated in cents.

The T-1 calculations from Form H, based upon data for the year 1959, and adjusted to reflect charges of 40 percent and 60 percent, respectively, on the reproduction and original cost bases for depreciation on freight cars, indicate a cost per per diem payable day of $2.53. This compares with the cost, produced by use of the same method, of $2.02 for the year 1956, and a mean of about $2.27. Table 28 indicates that 1957 cost experience was generally similar to 1956, with somewhat lower repair costs and improved utilization, suggesting a possible lower daily cost per car. 1958, while experiencing some 22,000,000 less per diem payable days, also shows a reduction of over $100,000,000 in repair costs. The increases in the daily cost per car indicated by the T-1 calculation for 1959 is explained to some extent by the increase of some $48,000,000 in repair costs during that year, together with a drop of some 31,000,000 in the per diem payable days over which the costs were spread.

Upon consideration of the available evidence, the Examiner finds that the just, fair, reasonable and non-discriminatory rate proper as a daily charge to subscribers to the per diem agreement for the use of per diem freight cars in and during each and every month from January, 1957, through November, 1959, inclusive, was $2.25.

(4) *The $2.88 Rate—1960 to 1964.*

This rate, which was in effect from December 1, 1959, to January 1, 1964, was supported by AAR staff calculations using cost statistics, other than for repairs, for the calendar year 1958. A five year adjusted average cost of repairs was employed, which, together with associated maintenance items, amounted to 105.35 cents per active car day. Allowance for taxes was 18.076 cents; return on depreciated investment in freight cars and repair facilities, based on reproduction costs, was 85.737 cents; allowance for depreciation of freight cars based on reproduction cost was 73.276 cents; and allowance for depreciation of repair facilities, based on original cost, was 1.451 cents. The total cost, as thus computed, 283.893

cents per active car day was adjusted to reflect 1959 cost increases, resulting in a figure of 287.94 cents which was rounded to the $2.88 rate.

As with the prior rates, it is now possible to measure this rate against costs for a portion of the period during which it was in effect. Calculations by the AAR staff underlying the multi-level rates include an analysis of costs for the calendar year 1961, covering one-fourth of the time the $2.88 rate applied. In addition, the Summary T-1 calculation by the Cost Section, based upon the 1960 special studies, provides a measure of costs for that year. Summary T-1 calculations, based upon the Form H formula, were also introduced for the years 1961 and 1962.

The cost per car per day is directly related to car utilization, or the number of per diem payable days over which the total costs for the year must be spread. This information is not available for 1963 but Summary T-1 estimates through 1962 can be obtained, based upon 1960 ratios. These in millions of car days, are 502.7, 475.6, and 458.7.[167] Table 28 indicates some reduction in property and payroll taxes during these years. Account 314 repair costs dropped some 52 million dollars in 1961, rose 15 million dollars in 1962, then dropped about 9 million in 1963. Charges to depreciation and interest on cars rose during the period. As computed by the T-1 method, aggregate ownership costs for 1960 were 1,256 million dollars, for 1961 the estimate is 1,226 million, and for 1962 the estimate is 1,269 million. Cost reductions in 1961 were more than counterbalanced by the reduction in per diem payable days available to absorb the total.

The cost index used to estimate the reproduction costs of freight cars did not change between 1962 and 1963, and experienced a relatively small increase between 1961 and 1962. As shown in Table 16, 1963 Account 314 re-

[167] Aggregate ownership costs divided by per diem unit cost or, active car days of per diem cars multiplied by 1.06263.

pairs were slightly less than in 1962, and was about $22,000,000 less than the four year average. These factors indicate a general similarity to 1962 conditions.

The AAR calculations for 1961, based upon reproduction cost both for depreciation of freight cars, and for return on depreciated investment in cars and repair facilities, using divisors of 543,856,972 and 553,040,655 days, produced a daily cost of $2.72892. Per diem payable days for 1961, as calculated by use of the Form H, Summary T-1 method, are approximately 475,547,000. The AAR calculations cover about 2½ percent more cars than the Summary T-1 figures and, as noted above, would have required the use of some 516,000,000 days in 1960. Applying the ratio of Summary T-1 per diem payable days in 1960 to this figure to 475,547,000 produces an estimated per diem payable days for 1961 of about 488,000,000 for application to the AAR costs.

Set forth below are the AAR calculations for 1961, revised in accordance with the principles heretofore discussed. The Account 314 figure for the year 1961 has been used, after adjustment as described with reference to the earlier rates. Interest on depreciated investment in cars has been estimated by taking the total amount allowed in the 1961 Summary T-1 calculation, together with the cost per day computed therein. Interest on car repair facilities has been similarly treated, in order to provide an original cost base for the two items.[168] Other items, apart from depreciation on cars, have been included in the same fashion as described with reference to the 1958 calculation. A divisor of 488,000,000 days has been used to reduce all charges, other than interest on cars and repair facilities, to a daily figure, based upon the estimated average utilization during the year 1961.

While Summary T-1 calculations of depreciation on a reproduction cost base were not offered in evidence for 1961, the depreciation charge used by the AAR, $396,-

[168] This results in an allowance of 6.62 percent interest on these items.

434,812, appears reasonable in relation to the Summary T-1 figures for 1959 and 1960, supra. As before, it has been reduced to reflect use of a base comprised of 40 percent of the original cost raised to a reproduction level, and 60 percent of the original cost unchanged.[160]

[160] Summary T-1 for 1960, using 40 percent of depreciation charge on original cost, and 60 percent of depreciation charge on reproduction cost, produces adjusted depreciation charge of $255,238,138. Ratio of latter to charge on reproduction cost base applied to $598,434,812 results in charge of $320,057,000.

TABLE 32

| Item | | Amount | Per Day (2) | Comments |
|---|---|---|---|---|
| 1 | Car Repair | 366,965,749 | 75.197 | Account 314 for 1961, adjusted. (1) |
| 2 | Prop. & Payroll Tax | 101,858,855 | 20.877 | (1) |
| 3 | Car Depr. | 321,057,000 | 65.786 | At 7.86 percent of reproduction value. (1) |
| 4 | Int. on Cars | 274,381,208 | 61.595 | At 6.62 percent on depreciated ledger value. |
| 5 | Depr. Rep. Fac. | 8,301,208 | 1.701 | Based on undepreciated ledger value. (1) |
| 6 | Int. on Rep. Fac. | 11,369,077 | 2.329 | At 6.62 percent on depreciated ledger value. |
| 7 | Misc. Main of Equip. Accts. | 50,145,801 | 10.317 | (1) |
| 8 | Main of Rep. Fac. | 18,451,321 | 3.781 | (1) |
| 9 | Accrual Expense | 30,924,888 | 6.337 | (1) |
| 10 | Deadhead Haul | 10,352,796 | 2.121 | (1) |
| 11 | Int. on stock of Rep. Materials | 2,502,571 | 0.513 | (1) |
| 12 | Int. on Working Cap. | 2,488,184 | 0.509 | (1) |
| Total | | | 250.930 | |

(1) Prime Assumptions per diem payable days.

The Summary T-1 calculation for the year 1960, adjusted to reflect depreciation on freight cars, based 40 percent on reproduction cost and 60 percent on original cost, indicates a cost per diem payable day of $2.58. No similar T-1 calculations are available for subsequent years but approximations may be obtained by increasing the 1961 and 1962 Form H, Summary T-1 calculations for depreciation on cars in proportion as the 1960 adjusted depreciation cost bears to the 1960 original cost based figure. The costs thus indicated are $2.67 and $2.86, respectively. See Table 33, below.

TABLE 33

SUMMARY T-1 COSTS

| | | 1960 (2) | 1961 (3) | 1962 (4) |
|---|---|---|---|---|
| 1 | Car Repairs | 116,113 | 114,025 | 122,240 |
| 2 | Depr. on Cars | 50,772 (5) | 54,972 (1) | 59,193 (1) |
| 3 | Depr. on Fac. | 1,596 | 1,676 | 1,736 |
| 4 | Prop. Taxes | 17,102 | 17,383 | 17,401 |
| 5 | Payroll Taxes | 5,597 | 5,486 | 6,488 |
| 6 | Int. on Cars | 54,200 | 57,692 | 61,355 |
| 7 | Int. on Fac. | 2,286 | 2,433 | 2,508 |
| 8 | Hire of Cars | 9,733 | 12,367 | 15,933 |
| 9 | Int. on Wk. Cap. | 0,570 | 0,584 | 0,627 |
| Total | | 257,975 | 266,618 | 285,485 |

(1) Estimated by use of the ratio of 1960 depreciation on original cost base to 1960 depreciation on adjusted cost base.

(2) From Exhibit H-1.

(3) From Exhibit H-245.

(4) From Exhibit H-246.

(5) Using 60 percent of 1960 depreciation charge on original cost base and 40 percent of 1960 depreciation charge on replacement cost base.

The difference in the estimated cost per car day for 1961, as between the AAR and Summary T-1 methods appears to result primarily from use by the AAR of ratios produced by the 1947 and 1956 studies, as compared with the use of the 1960 studies, and the Summary T-1 analysis. Some of the details have already been mentioned. The ratios and apportionments used in the T-1 formula are more recent, and are the product of a carefully designed study intended to develop the type of costs here in issue. It is found that the results produced by the Summary T-1 calculations are the more reliable for use in determining the ownership costs during the 1960-1964 period. The average of the costs for the years 1960-1962 inclusive is approximately $2.70. To the extent that data is available for 1963, it indicates conditions similar to 1962. The four year average, taking the 1963 daily cost at $2.86, as in 1962, is $2.74. In the absence of more precise data as to the costs for the entire period, and upon consideration of the available evidence, the Examiner finds that the just, fair, reasonable and nondiscriminatory rate proper as a daily charge to subscribers to the per diem agreement for the use of per diem freight cars in and during each and every month from December, 1959, through December, 1963, inclusive, was $2.74.[170]

(5) *Docket 31358 Defendants.*

As heretofore observed, the defendants having a present interest in this case are entitled to separate findings

[170] At an earlier stage of these proceedings there was some controversy with respect to an alleged "lag" in the per diem rates. It was asserted that since rates were established at the cost level of the year made effective, and since they remained thereafter at that level until the next increase while costs were rising in the meantime, they lagged behind actual costs and produced less than compensation. In view of the findings herein, this matter requires no further consideration.

as to their individual liabilities based upon that method of per diem cost calculation which most fairly distribute the ownership burden. Distribution of the burden among users by allocation of portions to time and mileage is designed to produce more equitable sharing thereof but, to accomplish this purpose, must fairly reflect the individual situation of each user. Evidence was offered of Summary MT-2 calculations showing the average rate on this basis for all carriers. The 1960 studies show that per diem cars experience more line-haul mileage on foreign lines than on owners' lines. There Summary MT-2 calculations reflect this greater usage in a higher cost chargeable to users than is produced by calculations which distribute the costs on a time-only basis. Thus, the Summary T-1 average cost for all railroads in 1960 was $2.50, compared to the Summary MT-2 figure of $2.77. The latter figure is more equitable to car owners, since it takes into account, on an overall basis, the fact that foreign lines made greater use of the cars, on a mileage basis. It does not, however, fairly distribute the burden among the users.

As computed by the Cost Section, the costs applicable to different carriers on the MT-2 basis varied from $1.55 to $5.66 per day in 1960 for 90 Class I roads. A substantial number are shown to have Summary MT-2 costs lower than the $2.88 average for this group. Of 72 Class II roads, 55 had lower MT-2 costs than the average for the group. Use of a flat cost figure applicable to all users, which averages out all these differences, largely defeats the purpose of the time-mileage allocations. It imposes unreasonably high charges upon users having low average daily distances for foreign cars, and would apparently produce a distribution no more equitable than one based solely on time.

Adjustment of ownership costs for past years to reflect a time-mileage distribution, based on 1960 data, requires the assumption that the relationships shown in 1960 fairly represent conditions existing during the prior years. The primary factors involved are the ratios of each carriers MT-2 cost for 1960 to the calculated cost for all carriers in that year. These depend, in large part, upon the similar relationships of line-haul mileages of foreign cars and per diem days paid for. Evidence offered by the Boston and Maine indicates that a substantial consistency has prevailed with respect to the relationship of per diem payable by the Class I defendants to the total payable by all Class I carriers during the years in issue. While the record is not as satisfactory as might be desired, Summary MT-1 and MT-2 calculations for 1960 demonstrate that the defendants should have their individual situations considered. Adjustment of the average cost of all carriers for past years to reflect the mileage factor for these carriers can be accomplished by use of relationships indicated in the 1960 studies. The results, while of limited accuracy, are found to produce a distribution of costs which more nearly measures the share of ownership burden fairly assignable to the defendants than is obtained by use of average costs on either a time only or time-mileage basis.

Set forth below are the calculations of charges which would, on the above-described basis, fairly assess against the defendants their rateable proportion of the ownership burden for the past periods here in issue. In Table 34 the 1960 cost per line-haul mile has been developed by use of the Summary MT-1 method, using cost bases and time-mileage apportionments, however, consistent with the findings herein. The cost per active car day also has been computed based on this method. Following the Summary MT-2 analysis, the cost per line haul mile has been

multiplied by the 1960 line haul mileage of foreign cars for each defendant, and the total divided by the per diem days paid for. The time cost has been developed by dividing the cost per active car day by the factor shown in Exhibit R-1, Summary MT-2, Column 10. The resulting daily cost for each defendant has been divided by the 1960 daily average cost for all railroads for 1960, based upon the Summary T-1 method, adjusted to reflect allowance of higher depreciation, of $2.58, as shown in Table 33. The resulting relationships have been applied to the costs developed on a similar time only basis heretofore found to be reasonable for each of the periods during which the challenged rates were in effect. The results are summarized in Table 35.

Upon consideration of the available evidence the Examiner finds that the just, fair, reasonable and non-discriminatory rates proper as a daily charge to each of the defendants in Docket 31358 for the use of foreign per diem freight cars in and during each and every month from August, 1953, through December, 1963, inclusive, are those shown in Table 35.

TABLE 34

MT-1 DISTRIBUTION OF 1960 COSTS

| Item | Total | Mileage | Time |
|---|---|---|---|
| 1 Repairs | 583,715,117[1] | 291,857,558 | 291,857,558 |
| 2 Depr. on Cars | 255,238,138[2] | 102,095,255 | 153,142,883 |
| 3 Depr. Rep. Fac. | 8,023,021 | | 8,023,021 |
| 4 Prop. Taxes-Cars | 82,153,074 | | 82,153,074 |
| 5 Prop. Taxes-Rep. Fac. | 3,824,341 | | 3,824,341 |
| 6 Payroll Taxes | 28,140,156 | | 28,140,156 |
| 7 Interest on Cars | 272,469,259 | | 272,469,259 |
| 8 Interest on Rep. Fac. | 11,489,897 | | 11,489,897 |
| 9 Hire of Cars | 48,929,073[3] | 9,242,911 | 39,686,162 |
| 10 Interest on Wk. Cap. | 2,896,316 | | 2,896,316 |
| Total | | $402,195,724 | 893,682,667 |
| Per Line Haul Mile | | 1.861 cents[4] | |
| Per Active Car Day | | | $1.889[5] |

(1) Separated 50% each to time and mileage—See Section VIII of this report.

(2) Based on 40% reproduction and 60% original cost—See Section VII; Separated 40% to mileage and 60% to time—See Section VIII of this report.

(3) This item is related to depreciation and interest on cars and has been separated 19.3% to mileage and 80.7% to time as the ratio shown for the totals of these items, as separated.

(4) Using as a divisor 21,676,209,267 line haul miles. See Exhibit R-1, Schedule 3, Sheet 1, Line 12, Column 6.

(5) Using as a divisor 473,083,857 active car days. See Exhibit R-1, Summary MT-1, Sheet 1, Line 17, Column 3.

## TABLE 35

RATES REFLECTING TIME-MILEAGE SEPARATION OF COSTS.

| Defendant | Ratio(1) | 8/1953-12/1956(9) | 1/1957-11/1959(9) | 12/1959-12/1963(9) |
|---|---|---|---|---|
| B&M | 1.062(2) | $2.21 | $2.39 | $2.91 |
| L.I. | 0.744(3) | $1.55 | $1.67 | $2.04 |
| N.Y.N.H.&H. | 0.732(4) | $1.52 | $1.65 | $2.01 |
| Rutland | 1.116(5) | $2.32 | $2.51 | $3.06 |
| N.J. & N.Y. | 0.768(6) | $1.60 | $1.73 | $2.10 |
| St. J. & L. C. | 1.000(7) | $2.08 | $2.25 | $2.74 |

(1) Indicated rates—Ratio for each carrier in 1960 applied to daily charge heretofore found reasonable on a time-only basis for each period; $2.08, $2.25, and $2.74, respectively.

(2) B&M ratio—97,411,439 line haul miles in 1960 times .01861 divided by 1,982,885 per diem days paid for, plus $1.889 divided by factor of 1.035 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(3) Long Island ratio—3,288,935 line haul miles in 1960 times .01861 divided by 733,414 per diem days paid for, plus $1.889 divided by factor of 1.030 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(4) N.Y.N.H.&H. ratio—98,690,038 line haul miles in 1960 times .01861 divided by 3,019,757 per diem days paid for, plus $1.889 divided by factor of 1.037 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(5) Rutland ratio—5,941,657 line haul miles in 1960 times .01861 divided by 106,626 per diem days paid for, plus $1.889 divided by factor of 1.024 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(6) N.J. & N.Y. ratio—194,285 line haul miles in 1960 times .01861 divided by 39,510 per diem days paid for, plus $1.889 divided by factor of 1.000 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(7) St. J.&L.C. ratio—1,320,107 line haul miles in 1960 times .01861 divided by 30,867 per diem days paid for, plus $1.889 divided by factor of 1.054 from Exhibit R-1, Summary MT-2, Col. 10, divided by $2.58 from Table 33.

(8) Line haul car miles of foreign cars taken from Exhibit R-1, Schedule 4, Col. 4, except for Class II defendants. Official notice of comparable data for the latter (N.Y. & N.J. R.R. and St. J. & L.C. R.R) contained in Cost Section supporting documents has been taken

(9) Rate per day in dollars and cents.

(6) *The Multi-Level Rates—January 1, 1964.*

The rates for the several brackets under the new multi-level system are supported by an AAR study which separated the ownership burden into two charges, one for depreciation and interest on car value, and one covering total operating costs including taxes. After classifying cars into value brackets according to their depreciated original cost, the amount to be allowed cars in each bracket for depreciation was calculated by allowing three percent on the average undepreciated reproduction value of that group of cars. The amount allowed as interest was calculated by taking six percent of the average depreciated reproduction value of all cars in the group. All other costs were taken as the same for every car, and were calculated at $406 per car. In calculating the cost of taxes, and the repair and associated maintenance costs, which produced the figure of $406, the AAR employed the same procedures used in computing these items in prior years. Ratios and apportionments used were those developed by the 1956 questionnaire, heretofore mentioned. Account 314 repair costs to be anticipated were estimated by using the average of such costs for the five year period, 1957-1961, and a car utilization factor of 94.87, or 335.33 days, was assumed, based upon the average of the twenty-year period, 1942 through 1961. The 1961 data used by the AAR, together with such information as can be derived from the 1960 Summary T-1 calculations, and the Form H. Summary T-1 calculations for 1961 and 1962, provide the basis of record for findings with respect to the period since January, 1964.

Mention has already been made of the calculations by the Cost Section based upon the 1960 studies, separated by car value. Like the AAR calculations these assumed a constant cost per car for all items other than depreciation and interest on cars, and for convenience, em-

ployed the same value brackets. In connection with the development of costs on this basis, the methods used were similar to those employed in the original T-1 calculations, except that the cars were grouped, valued, their depreciated value determined by use of a percent of cost new, and regrouping then accomplished on the depreciated basis. Reproduction value, depreciated and undepreciated, was also calculated using the cost index heretofore described. Active per diem car days were distributed among the brackets on the basis of percentage distribution of the number of owned cars in the per diem fleet. The cost per active car day in each bracket was divided by the ratio of foreign cars to active foreign cars taken from Summary MT-2 to develop the per diem unit cost.

Set forth below are the amounts calculated by the Cost Section as the average original cost, depreciated original cost, and reproduction cost of cars in each value bracket, together with the calculated per diem costs on both original and reproduction cost bases.[171] An appreciable reduction in the rate of increase in the cost index, heretofore described, took place after 1959. In 1960 the Account 53 index was 619, an increase of but seven points over 1959, compared with an average of nearly 27 points per year over the preceding nine years. In 1961 the index was 624, and in 1962 and 1963 it remained at 627. Form H, Summary T-1 calculations for 1961 and 1962 indicate a continuing reduction in the total number of cars in the per diem fleet, but a fairly constant number of per diem payable days per car, 297 in 1961 and 296 in 1962, compared with 306 in 1960. Repair and maintenance costs per car, as heretofore noted,[172] dropped to about $372

[171] The brackets used are those in effect prior to April 1, 1965. No calculations are of record with respect to the brackets and rates which became effective on that date. Data shown is taken from Exhibit R-80.

[172] See Footnote No. 88

per car in 1961, then rose to about $398 per car in 1962, compared with about $389 in 1960. It appears reasonable to employ the average figure of 300 per diem payable days, and a repair cost of about $390.00 in measuring the costs to be anticipated in 1964.

Reference to Table 36, below, shows the average original cost of cars in AAR Bracket No. 1, as computed by the Cost Section, was $2,280. On a reproduction value basis, the average was $7,657, an increase of some 336 percent. This approximates the relationship of the 1936 index of 182 to the 1960 index of 619. Similarly, for cars in AAR Bracket No. 2, the increase over original cost due to use of reproduction value was some 189 percent, approximately the relationship of the 1947 index of 320 to the 1960 index. Table 14 indicates that capital costs per thousand for cars of these respective average ages are approximately $70.20 and $75.34. Employing these figures, the capital costs for the average original cost cars in AAR Brackets 1 and 2 are $160.05 and $314.70, respectively. Adding a repair and maintenance cost of $390.00 and dividing by 300 per diem payable days produces costs of about $1.83 and $2.35 per car per day. These costs, as well as costs similarly calculated for the other brackets, are shown in the last column in Table 36.

TABLE 36

| Val. Br. | Av. Orig. Cost | Av. Reproduction Cost | Av. Depreciated Orig. Cost | T-1 Orig. Cost Base | T-1 Repro. Cost Base | AAR Rate | Table 14 Cost |
|---|---|---|---|---|---|---|---|
| 1 | 2,280 | 7,657 | 625 | 187 | 269 | 216 | 183 |
| 2 | 4,177 | 7,905 | 2,639 | 245 | 325 | 279 | 235 |
| 3 | 8,102 | 9,484 | 7,133 | 372 | 411 | 358 | 357 |
| 4 | 12,131 | 12,452 | 11,599 | 500 | 512 | 450 | 479 |
| 5 | 17,322 | 17,156 | 17,115 | 660 | 659 | 615 | 646 |
| 6 | 23,364 | 23,715 | 22,866 | 831 | 842 | 774 | 821 |

Measured by either Summary T-1 cost, or by those calculated as just described, the rates in Brackets 3 through 6 could not be found to exceed reasonable compensation to owners. Summary T-1 costs, based upon original costs only, indicate an excess of compensation with respect to the first two brackets, particularly since they include depreciation and interest on fully depreciated cars. As of January 1, 1962, nearly 81 percent of all per diem cars were in these two brackets. They are necessarily the brackets whose costs are most affected by the substantial number of cars over 30 years of age.[173] While allowance for the effects of inflation on the recovery of invested capital is appropriate, there is no basis in a multi-level system for allowing such recovery in any amount on cars which have already been fully depreciated. While the detailed data necessary to make such adjustments to the Summary T-1 costs is not of record, it is apparent that the result would be to lower the indicated costs on both the original and reproduction cost basis. At the same time, the allowance for depreciation based in part on reproduction costs would have the effect of raising the level of these costs. The rates shown in the last column of Table 34 reflect the application of these principles, based upon average conditions shown for the years 1960 through 1962, and indicate that the rates of $2.16 and $2.79 for cars in Brackets No. 1 and 2 were and are higher than reasonable compensation. Rates in these brackets sufficient to compensate car owners for the burden of owner-

[173] Approximately 25 percent of the cars in these two brackets fall into the over-30 year category. They numbered, on January 1, 1962, some 324,729, or 20.21 percent of all per diem cars. Not only was depreciation on such cars included, but it was based on their full reproduction value without allowance for salvage value.

Value Brackets 1 and 2. Compensatory rates for cars in Value Brackets 1 and 2 would not exceed $1.83 and $2.35, respectively.

The Examiner further finds that just and reasonable compensation for the use of freight cars in interchange service will result from the calculation and assessment of charges in a manner not inconsistent from that set forth in this report. The revision of rate tables and institution of appropriate systems to account for time and mileage of cars will necessarily require some period of time, during which the present multi-level system may be employed, subject to findings as to the reasonableness of the rates presently provided under that system. Respondents will be required to advise the Commission within sixty days of the effective date of the final order in this case of the earliest date a rate system not inconsistent with the findings and conclusions herein can be made effective. Requested findings not reflected in the findings and conclusions herein have been considered and found not justified.

*Docket No. 31358*

It is the Opinion of the Hearing Examiner that in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof; and that the proceeding in Docket 31358 be, and it is hereby, discontinued.

Dated at Washington, D. C., this 8th day of December, A. D. 1965.

By the Commission, R. C. Bamford, Hearing Examiner.

H. Neil Garson
Secretary

(Seal)

*Docket No. 33145*

It is the ORDER of the Hearing Examiner that in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof; that the respondents in Docket 33145 be and they are hereby ordered to promptly take appropriate steps pursuant to the provisions of the per diem agreement (Section 5a Application No. 7, Association of American Railroads, Per Diem, Mileage, Demurrage and Storage Agreement) to revise the present multi-level rates, and the rules, regulations and practices pertaining thereto, so as to eliminate the unreasonableness heretofore found to exist, and in such fashion as to be not inconsistent with the findings and conclusions in the attached report, and to advise the Interstate Commerce Commission not more than sixty days from the effective date of this order of the earliest date upon which such revision can be placed in effect, and thereafter to place and maintain in effect the aforesaid revised system and rates, and that this order shall continue in force until further order of the Commission.

It is further ordered that the presently effective multi-level rates may be continued in use until the above-mentioned revisions can be accomplished, subject to findings herein as to the reasonableness of rates in Value Brackets 1 and 2.

Dated at Washington, D. C., this 8th day of December, A. D. 1965.

By the Commission, R. C. Bamford, Hearing Examiner.

H. NEIL GARSON
Secretary

(SEAL)

*Docket No. 34405*

It is the Opinion of the Hearing Examiner that in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof; and that the complaint in Docket 34405, except to the extent to which the relief sought has been granted by order in Docket 33145, be, and it is hereby, dismissed.

Dated at Washington, D. C., this 8th day of December, A. D. 1965.

By the Commission, R. C. Bamford, Hearing Examiner.

H. Neil Garson
Secretary

(SEAL)

## Appendix A

*Definitions of Terms*

1. Per Diem Cars:

Freight train cars owned or held under lease arrangement by railroads whose interline rental is settled on a per diem basis under the Code of Per Diem Rules or would be so settled if used by another railroad.

2. Mileage (also Other Non-Per Diem Cars):

Includes all freight train cars other than per diem cars, such as cabooses, cars whose charges are settled on a mileage basis cars, not meeting interchange standards, etc.

3. Home Cars:

Per diem cars which are located on the tracks of the railroad owning same or having control thereof pursuant to a lease arrangement.

4. Foreign Cars:

Per diem cars which are not located on the tracks of the railroad owning same or having control thereof pursuant to a lease arrangement.

5. Surplus Cars:

Per diem cars in operating condition but idle, and for which ladings are not available. The Cost Section studies defined cars in this group as those found to have been empty and idle for a period of 48 hours.

6. Bad Order Cars:

Per diem cars which are not in operating condition and available for active service due to the need for repairs.

7. Car Day Division:

The figure which represents the total days over which the per diem costs attributable to time are to be spread. It is expressed both as a total figure applicable to all costs, and as a figure per car, for application to the costs on a per car basis.

8. Ownership Repairs:

Also referred to as owner responsibility repairs. Repairs to per diem cars necessitated by ordinary wear and tear in fair service which, in the case of foreign cars, is ordinarily billable to the owner. Includes repairs of this description where the circumstances are such, pursuant to the Interchange Rules, that no bill would be made to the owner. Repairs classed as ownership responsibility may be made by owners on their own cars or by users on foreign cars, regardless of where the incident which may have made it necessary occurred.

9. User Repairs:

Also referred to as user responsibility repairs. Repairs to per diem cars made necessary by damage due to unfair usage or improper protection by the using line. This type of repair may be the actual responsibility of either a user of a foreign car, or an owner with respect to its own car. Such repairs may be made by the owner or user upon whose line the damage occurred, or by another user to whom the car is delivered. In the latter case, the repairing line bills the responsible line or the owner. If the latter, it then bills the responsible line. User responsibility repairs should not be included in the cost calculations supporting per diem rates.

10. Net Per Diem Creditor:

A railroad which, on an annual basis, receives a greater amount of revenue from the use of its cars by other railroads than the debt which it incurs by its use of the car of other railroads.

11. Net Per Diem Debtor:

A railroad which, on an annual basis, receives a lesser amount of revenue from the use of its cars by other railroads than the debt which it incurs by its use of the cars of other railroads.

12. Predominantly Originating Carrier:

A railroad which originates and sends off its lines a substantially greater number of freight car loads than it receives and delivers to destinations on its lines. Such carriers generally occupy a per diem creditor position, due to this characteristic of their service.

13. Predominately Terminating Carrier:

A railroad which receives and delivers to destinations on its line a substantially greater number of freight car loads than it originates and sends off line. Such carriers generally occupy a per diem debtor position, due to this characteristic of their service.

## Appendix B

### *Rail Form H*

Summary 1-1 of this form combines certain totals from Schedules 1 and 2, to develop in Column 3 the aggregate ownership costs for all per diem cars and in the per diem days paid for by all U.S. railroads. Since it was originally designed to develop a uniform cost for all cars, regardless of value, it includes certain investment costs which should be deleted. These are Line 2, Depreciation of freight train cars, Line 4, Property taxes allocated to freight train cars, Line 7, Return on investment in freight train cars and Line 9, Hire of Freight Cars. Line 11 will then contain the items of repair and maintenance which, based upon the information in this record, should be spread over the costs of all per diem cars equally. As has been noted, further studies may demonstrate a need for separate calculation of these costs between type, age, and or value of cars. Lines 12 and 13, and Footnote 2 to this Summary, have to do with the "repair deficiency" which has already been found not appropriate as a deduction from the ownership costs. Lines 14 through 19 provide a method for calculation of the per diem days paid for, based upon the 1960 data. This figure is related to the problem of distribution of the ownership costs and employs data compiled and summarized in Schedule 2, hereinafter described.

Repair and maintenance costs, after deletion of the items mentioned above, are as follows:

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## Appendix C

Where an owner finances a substantial part of the
of cars, and is required to meet annual payments spr
over a period of fifteen years, contribution from car u
based upon spreading costs over a period of 30 y
requires the owner to carry the difference between
payments on the obligation and the annual contribu
by users. This is in effect, additional contribution by
owner to the capital cost of the car, and it should rec
interest thereon until repaid. This payment should
accomplished during the second fifteen years of the
year period by the excess of per diem charges over
then reduced capital costs. The adequacy of the calc
tions herein recommended to accomplish this purpose
indicated by the following tables.

Table A shows the charges, taken from Table 1 in
text, necessary to meet costs per $1,000 in a fifteen y
period where 80 percent of the cost of the car is finan
at 4½ percent. In Column 2 is shown costs on the sa
basis but spread over a thirty year period, taken fr
Table 4. Column 3 shows the amount of difference
each year which the owner must carry. The interest
6.62 percent and the cumulative totals are shown in
remaining columns. This table indicates that rates ba
upon costs shown in Table 4 would be somewhat less th
necessary to compensate car owners under the assum
conditions.

Table B is similarly constructed but is based upon
assumed 40 percent payment by the owner of the origi
cost, and financing of the remaining 60 percent. T
figures in Columns 1 and 2 were constructed in simi
fashion to those in Tables 1 and 4 of the text. This ta
indicates that rates based upon costs shown in Colum

would be very slightly less than necessary to compensate car owners under the assumed conditions.

Although occasional car acquisitions are made with cash payments exceeding 40 percent of the cost, the great majority involve lesser amounts. Table B indicates that rates constructed in relation to the figures in Column 2 would be adequate to compensate owners for the considered capital items in all instances of cash down payments under 40 percent of the original cost. Calculations which, as in this report, allow for the impact of inflation with respect to 40 percent of the original cost, with interest at 6.62 percent on the unreturned balance, produce overcompensation in varying degrees where cars are purchased at lower down payments. Giving consideration, however, to the impact of losses in purchasing power of the additional dollars invested by reason of carrying the above-described differences, and the most common, 20 percent, payment, the return is found to be the most nearly equitable shown by the record. This is indicated by Table C, below, in which the 15 year burden of an 80 percent financed purchase is compared with costs calculated on a 30 year basis, assuming a 40 percent payment and 60 percent financing.

## Table A

### Twenty Percent Cash—Eighty Percent Financed

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|---|---|---|---|---|---|---|---|
| | 15 Yr. Burden[1] | 30 Yr. Spread[2] | Carried Amt. | Cuml. Int. | Cuml. Total | Return of Capital | Balance Carried |
| 1 | 119.09 | 89.95 | 29.14 | 1.93 | 31.07 | | |
| 2 | 115.82 | 88.31 | 27.51 | 3.88 | 62.46 | | |
| 3 | 112.55 | 86.68 | 25.87 | 5.85 | 94.18 | | |
| 4 | 109.27 | 85.04 | 24.23 | 7.83 | 126.14 | | |
| 5 | 106.01 | 83.41 | 22.60 | 9.85 | 158.59 | | |
| 6 | 102.72 | 81.78 | 20.94 | 11.88 | 191.41 | | |
| 7 | 99.43 | 80.15 | 19.28 | 13.95 | 224.64 | | |
| 8 | 96.16 | 78.51 | 17.65 | 16.04 | 258.33 | | |
| 9 | 92.89 | 76.88 | 16.01 | 18.16 | 292.50 | | |
| 10 | 89.61 | 75.24 | 14.37 | 20.31 | 327.18 | | |
| 11 | 86.34 | 73.61 | 12.73 | 22.50 | 362.41 | | |
| 12 | 83.07 | 71.97 | 11.10 | 24.73 | 398.24 | | |
| 13 | 79.80 | 70.35 | 9.45 | 26.99 | 434.68 | | |
| 14 | 76.48 | 68.71 | 7.77 | 29.29 | 471.74 | | |
| 15 | 73.26 | 67.09 | 6.17 | 31.64 | 509.55 | | |
| 16 | 7.78 | 65.42 | (57.64) | 33.73 | 509.55 | 23.91 | 485.64 |
| 17 | " | 63.83 | (56.05) | 32.15 | 485.64 | 23.90 | 461.74 |
| 18 | " | 62.19 | (54.41) | 30.57 | 461.74 | 23.84 | 437.90 |
| 19 | " | 60.57 | (52.79) | 28.99 | 437.90 | 23.80 | 414.10 |
| 20 | " | 58.93 | (51.15) | 27.41 | 414.10 | 23.74 | 390.36 |
| 21 | " | 57.30 | (49.52) | 25.84 | 390.36 | 23.68 | 366.68 |
| 22 | " | 55.66 | (47.88) | 24.27 | 366.68 | 23.61 | 343.07 |
| 23 | " | 54.03 | (46.25) | 22.71 | 343.07 | 23.54 | 319.53 |
| 24 | " | 52.39 | (44.61) | 21.15 | 319.53 | 23.46 | 296.07 |
| 25 | " | 50.76 | (42.98) | 19.60 | 296.07 | 23.38 | 272.69 |
| 26 | " | 49.12 | (41.34) | 18.05 | 272.69 | 23.29 | 249.40 |
| 27 | " | 47.49 | (39.71) | 16.51 | 249.40 | 23.20 | 226.20 |
| 28 | " | 45.85 | (38.07) | 14.97 | 226.20 | 23.10 | 203.10 |
| 29 | " | 44.22 | (36.44) | 13.45 | 203.10 | 22.99 | 180.11 |
| 30 | " | 42.58 | (34.80) | 11.92 | 180.11 | 22.88 | 157.23 |

[1]—From Table 1.
[2]—From Table 4.

## Table B

### Forty Percent Cash—Sixty Percent Financed

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|---|---|---|---|---|---|---|---|
| | 15 Yr. Burden | 30 Yr. Spread | Carried Amt. | Cuml. Int. | Cuml. Total | Return of Capital | Balance Carried |
| 1 | 123.20 | 94.13 | 29.07 | 1.92 | 30.99 | | |
| 2 | 120.17 | 92.62 | 27.55 | 3.88 | 62.42 | | |
| 3 | 117.16 | 91.11 | 26.05 | 5.86 | 94.33 | | |
| 4 | 114.14 | 89.59 | 24.55 | 7.87 | 126.75 | | |
| 5 | 111.11 | 88.08 | 23.03 | 9.92 | 159.70 | | |
| 6 | 108.09 | 86.58 | 21.51 | 12.00 | 193.21 | | |
| 7 | 105.07 | 85.06 | 20.01 | 14.12 | 227.34 | | |
| 8 | 102.05 | 83.55 | 18.50 | 16.27 | 262.11 | | |
| 9 | 99.03 | 82.04 | 16.99 | 18.48 | 297.58 | | |
| 10 | 96.01 | 80.52 | 15.49 | 20.73 | 333.80 | | |
| 11 | 92.98 | 79.01 | 13.97 | 23.02 | 370.79 | | |
| 12 | 89.97 | 77.50 | 12.47 | 25.37 | 408.63 | | |
| 13 | 86.95 | 75.99 | 10.96 | 27.78 | 447.37 | | |
| 14 | 83.92 | 74.48 | 9.44 | 30.24 | 487.05 | | |
| 15 | 80.89 | 72.98 | 7.91 | 32.77 | 527.73 | | |
| 16 | 7.78 | 71.47 | (63.69) | 34.94 | 527.73 | 28.75 | 498.98 |
| 17 | " | 69.96 | (62.18) | 33.03 | 498.98 | 29.15 | 469.83 |
| 18 | " | 68.45 | (60.67) | 31.10 | 469.83 | 29.57 | 440.26 |
| 19 | " | 66.94 | (59.16) | 29.15 | 440.26 | 30.01 | 410.25 |
| 20 | " | 65.43 | (57.65) | 27.16 | 410.25 | 30.49 | 379.76 |
| 21 | " | 63.92 | (56.14) | 25.14 | 379.76 | 31.00 | 348.76 |
| 22 | " | 62.40 | (54.62) | 23.09 | 348.76 | 31.53 | 317.23 |
| 23 | " | 60.89 | (53.11) | 21.00 | 317.23 | 32.11 | 285.12 |
| 24 | " | 59.38 | (51.60) | 18.87 | 285.12 | 32.73 | 252.39 |
| 25 | " | 57.86 | (50.08) | 16.71 | 252.39 | 33.37 | 219.02 |
| 26 | " | 56.35 | (48.57) | 14.50 | 219.02 | 34.07 | 184.95 |
| 27 | " | 54.84 | (47.06) | 12.24 | 184.95 | 34.82 | 150.13 |
| 28 | " | 53.32 | (45.54) | 9.94 | 150.13 | 35.60 | 114.53 |
| 29 | " | 51.81 | (44.03) | 7.58 | 114.53 | 36.45 | 78.08 |
| 30 | " | 50.30 | (42.52) | 5.17 | 78.08 | 37.35 | 40.73 |

## Table C

### Comparison—Twenty-Forty Percent Calculations

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|---|---|---|---|---|---|---|---|
| | 20 Percent 15 Yr. Burden[1] | 40 Percent 30 Yr. Spread[2] | Carried Amt. | Cuml. Int. | Cuml. Total | Return of Captial | Balance Carried |
| 1 | 119.09 | 94.13 | 24.96 | 1.65 | 26.61 | | |
| 2 | 115.82 | 92.62 | 23.20 | 3.30 | 53.11 | | |
| 3 | 112.55 | 91.11 | 21.44 | 4.94 | 79.49 | | |
| 4 | 109.27 | 89.59 | 19.68 | 6.57 | 105.74 | | |
| 5 | 106.01 | 88.08 | 17.93 | 8.19 | 131.86 | | |
| 6 | 102.72 | 86.58 | 16.14 | 9.80 | 157.80 | | |
| 7 | 99.43 | 85.06 | 14.37 | 11.40 | 183.57 | | |
| 8 | 96.16 | 83.55 | 12.61 | 12.99 | 209.17 | | |
| 9 | 92.89 | 82.04 | 10.85 | 14.57 | 234.59 | | |
| 10 | 89.61 | 80.52 | 9.09 | 16.13 | 259.81 | | |
| 11 | 86.34 | 79.01 | 7.33 | 17.68 | 284.82 | | |
| 12 | 83.07 | 77.50 | 5.57 | 19.22 | 309.61 | | |
| 13 | 79.80 | 75.99 | 3.81 | 20.75 | 334.17 | | |
| 14 | 76.48 | 74.48 | 2.00 | 22.25 | 358.42 | | |
| 15 | 73.26 | 72.98 | 0.28 | 23.75 | 382.45 | | |
| 16 | 7.78 | 71.47 | (63.69) | 25.32 | 382.45 | 38.37 | 344.08 |
| 17 | " | 69.96 | (62.18) | 22.78 | 344.08 | 39.40 | 304.68 |
| 18 | " | 68.45 | (60.67) | 20.17 | 304.68 | 40.50 | 264.18 |
| 19 | " | 66.94 | (59.16) | 17.49 | 264.18 | 41.67 | 222.51 |
| 20 | " | 65.43 | (57.65) | 14.73 | 222.51 | 42.92 | 179.59 |
| 21 | " | 63.92 | (56.14) | 11.89 | 179.59 | 44.25 | 135.34 |
| 22 | " | 62.40 | (54.62) | 8.85 | 135.34 | 45.77 | 89.57 |
| 23 | " | 60.89 | (53.11) | 5.93 | 89.57 | 47.18 | 42.39 |
| 24 | " | 59.38 | (51.60) | 2.81 | 42.39 | 48.79 | (6.40) |
| 25 | " | 57.86 | (50.08) | | | | (50.08) |
| 26 | " | 56.35 | (48.57) | | | | (48.57) |
| 27 | " | 54.84 | (47.06) | | | | (47.06) |
| 28 | " | 53.32 | (45.54) | | | | (45.54) |
| 29 | " | 51.81 | (44.03) | | | | (44.03) |
| 30 | " | 50.30 | (42.52) | | | | (42.52) |

[1]—From Table 1.
[2]—From Table B.

D249

INTERSTATE COMMERCE COMMISSION

SERVED DATE
January 6, 1966

No. 31358

*Chicago, Burlington & Quincy R. R. Co., et al.*

*-v.*

*New York, Susquehanna & Western Railroad Co., et al.*

NOTICE TO THE PARTIES

This is to correct a mathematical error in the figures appearing in Table 35 on Page 160 of the recommended report in the above-entitled proceeding opposite the New York, New Haven and Hartford Railroad as follows:

"N.Y.H.&H. 0.732[4] $1.52 $1.65 $2.01"

There should be substituted for the foregoing, the following:

"N.Y.H.&H. 0.941[4] $1.96 $2.12 $2.58"

Dated at Washington, D. C. this 3rd day of January, A.D. 1966.

By the Commission, R. C. Bamford, Hearing Examiner.

H. NEIL GARSON
Secretary

# APPENDIX E

No. 31358[1]

## CHICAGO, BURLINGTON & QUINCY R. CO., ET AL. v. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

*Decided January 17, 1968*

1. In docket Nos. 31358 and 34405, per diem rates of $2.40, $2.75, $2.88 and multilevel per diem rates for the use of railroad-owned freight cars when on the lines of rail carriers other than their owners, found not shown to be just and reasonable. Just and reasonable rates for use in the settlement of claims between the complainants and defendants determined.
2. In docket Nos. 33145 and 34405, per diem rates and conservative methods of calculation adequate to provide just and reasonable compensation to owners of freight cars and to provide for fair reasonable, and nondiscriminatory assessment of charges upon railroads using such cars, prescribed.

*Andrew C. Armstrong, John C. Ashton, Richard R. Bongartz, S. R. Brittingham, Jr., Robert J. Cooney, John A. Daily, Kemper A. Dobbins, Robert H. Duesenberg, J. H. Durkin, Donald M. Dunn, Kenneth H. Ekin, A. Paul Funkhouser, James A. Gillen, John Guandolo, Alfred W. Hesse, Jr., Howard D. Koontz, A. W. Laisy, R. D. Lalanne, Joseph L. Lenihan, Charles M. Little, David G. Macdonald, G. M. Mariner, John F. McCartney, John E. McCullough, R. K. Merrill, Martin A. Meyer, Jr., P. C. Mullen, W. H. Parsons, Charles D. Peet, Duncan B. Phillips, Ernest Porter, Leo H. Pou, Howard E. Roos, Albert B. Russ, Jr., John J. Schmidt, Andrew C. Scott, John S. Shannon, T. J. Slattery, Elmer B. Trousdale, Donal L. Turkal, Harold B. Vikoren, Robert J. Williams, Claude R. Wilson, Jr., Robert W. Yost,* and *Erle J. Zoll, Jr.*, appeared for complainants in docket No. 31358 on rehearing and reconsideration.

[1] This report embraces also docket No. 33145, *Railroad Freight Car Per Diem Charges* and docket No. 34405, *Southern Railway Company et al. v. The Pennsylvania Railroad Company, et al.*, which proceedings were only originally involved on further hearing.

*Reginald Ames, Hewitt Biaett, S. R. Brittingham, Jr., Benson T. Buck, J. T. Clark, John H. Colgren, Clifford T. Coomes, Richard E. Costello, John C. Danielson, Kemper A. Dobbins, Gerald E. Dwyer, John W. Hanifin, L. W. Hobbs, Thormund A. Miller, C. Harold Peterson, Roland Posey, W. C. Purnell, Edward M. Reidy, John F. Reilly, E. L. Ryan, Jr., Jerome H. Shapiro, Matthew V. Stepsis,* and *Herbert A. Waterman* appeared for interveners in support of complainants in docket No. 31358 on rehearing and reconsideration.

*Andrew J. Azzara, Richard Swan Buell, Andrew M. Calamari, James I. Collier, Jr., William T. Griffin, Joseph P. Hawryluk, William J. Hickey, Neal Holland, J. N. Hood, Theodore S. Hope, Jr., George M. Onken, Carl E. Newton, Peter Benson Spruance, Richard H. Stokes, William Tatlock, M. Lauck Walton,* and *Granville Whittlesey, Jr.,* appeared for defendants in docket No. 31358 on rehearing and reconsideration.

*William J. Hickey* and *J. N. Hood* appeared for interveners in support of defendants in docket No. 31358 on rehearing and reconsideration.

All of the above-named counsel and, in addition, the following: *Martin J. Keating, Gordon E. Neuenschwander, Eldon S. Olson, Richard H. Strodel, Donal L. Turkal,* and *L. F. Van Kleeck* for respondents in docket No. 33145.

*John Guandolo, David G. Macdonald* and *Duncan B. Phillips* for complainants in docket No. 34405.

*Regionald Ames, Andrew J. Azzara, Richard R. Bongartz, S. R. Brittingham, Jr., Benson T. Buck, Richard Swan Buell, John H. Colgren, James I. Collier, Jr., Clifford T. Coomes, J. Crossan Cooper, Jr., James A. Gillen, William T. Griffin, John W. Hanifin, Theodore S. Hope, Jr., James W. Hoeland, Howard D. Koontz, A. W. Laisy, Richard D. Lalanne, R. K. Merrill, Thormund A. Miller, Carl E. Newton, George M. Onken, Eldon S. Olson, W. H. Parsons, C. Harold Peterson, Roland Posey, John F. Reilly, Howard E. Roos, Albert B. Russ, Jr., M. D. Sampels, John J. Schmidt, John S. Shannon, Richard H. Stokes, William Tatlock, William A. Thie, Elmer B. Trousdale, Donal L. Turkal, E. L. Van Dellen, Harold B. Vikoren, M. Lauck Walton, Edward K. Wheeler, Granville Wittlesey, Jr.,* and *Robert W. Yost* for defendants in docket No. 34405.

*Lyman C. Bybee* for Bureau of Enforcement (formerly Bureau of Inquiry and Compliance), Interstate Commerce Commission.

REPORT AND ORDER OF THE COMMISSION ON FURTHER HEARING

BUSH, *Commissioner:*

Exceptions to the report and order recommended by the examiner were filed by several parties, each of which subsequently filed replies to the exceptions of the others.[2] Our conclusions differ in part from those recommended. Exceptions and requested findings not specifically reflected in our findings or conclusions have been considered and found not justified.

## HISTORY OF THE PROCEEDINGS

The title case was commenced by a complaint filed September 21, 1953, by 19 of the larger class I railroads against several eastern railroads.[3] The complainants sought a finding and declaration by the Commission that each of the rates of $1.75, $2 and $2.40 per day charged by railroad freight car owners to other railroads for use of their cars were just, reasonable, and otherwise lawful during the periods they were effective, and that the performance of orderly transportation service by rail in the public interest required uniform observance of such rates by the defendants together with other carriers. Fifteen class I railroads intervened in behalf of complainants, and 56 railroads, principally classes II and III, intervened in behalf of the defendants. The Commission on October 17, 1955, found and declared that these rates were not in excess of reasonable compensation during the periods they were effective, that the $2.40 charge was not in excess of reasonable compensation for use at that time, and ordered the proceeding discontinued. *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I.C.C. 291 (1955).

On review by a three-judge United States District Court it was held, one judge dissenting, that the Commission had jurisdiction

[2] Bureau of Enforcement; Boston and Maine Corporation; trustees of the New York, New Haven and Hartford Railroad Company; Southern Railway System; Lehigh Valley Railroad Company; New York Central Railroad Company; Pennsylvania Railroad Company; Long Island Railroad; New Jersey and New York Railroad; Atlantic Coast Line Railroad; Baltimore & Ohio Railroad; Chesapeake & Ohio Railroad; Chicago, Burlington & Quincy Railroad; Chicago & Eastern Illinois Railroad; Chicago, Rock Island & Pacific Railroad; Denver & Rio Grande Western Railroad; Erie-Lackawanna Railroad; Great Northern Railway; Gulf, Mobile & Ohio Railroad; Illinois Central Railroad; Louisville & Nashville Railroad; Missouri Pacific Railroad; Norfolk & Western Railroad; Northern Pacific Railroad; St. Louis-San Francisco Railroad; Seaboard Air Line Railroad; Soo Line Railroad; Southern Pacific Company; Union Pacific Railroad; Western Maryland Railroad; Western Pacific Railroad; and Atchison, Topeka & Santa Fe Railroad.

[3] The original defendants included the Boston & Maine; New York, New Haven and Hartford; Long Island R. Co.; New Jersey & New York; Rutland, St. Johnsbury & Lamoille County; and New York, Susquehanna & Western.

under sections 1, 13 and 16 of the Interstate Commerce Act and section 5(d) of the Administrative Procedure Act (5 U.S.C. §1004 (d)) to enter orders awarding damages and, to enter a declaratory order with respect to the reasonableness of past car-hire charges. *Boston & Maine Railroad et al.* v. *United States*, 162 F. Supp. 289 (1958). The court further held that (1) the Commission should not have rejected without a more thorough investigation and more detailed findings and analysis a recommendation that the railroad accounts pertaining to car-hire costs be broken down by the railroads to reflect more accurately the actual annual cost of maintaining a freight car; (2) where depreciation of freight cars was an important element of per diem charge for use on railroads' lines of freight cars owned by other railroads, the Commission in determining unreasonableness of such charges should not have tossed aside as irrelevant accepted accounting practices for determining depreciation based on undepreciated ledger value and should not have accepted "undepreciated [re]production (sic) value"; (3) the Commission erred insofar as it considered car age a factor in computing car utilization; and (4) where time-mileage plan for determining charges for use on railroads' lines of freight cars owned by other railroads involved a separation of national aggregate car ownership cost into two categories, such plan, under facts, deserve more than cursory consideration given to it by the Commission in determining the reasonableness of said charges, since without more detailed findings by the Commission, the court could not exercise its judicial function. The court thus set aside and annulled the order of the Commission discontinuing the proceeding and remanded the case for further proceedings not inconsistent with the court's opinion.

On appeal to the United States Supreme Court, the Commission expressed its readiness to proceed in accordance with the terms of the remand, recognizing that further investigation and more detailed findings would be required to comply with the lower court's opinion. The Supreme Court recognized, however, that:

> Should such proceedings lead the Commission to reconsider its estimate of the desirability of a *per diem* embracing a mileage factor, the result might well be not a declaration that the present *per diem* is just and reasonable but the establishment of a new rate.

*Boston & Maine Railroad* v. *United States*, 358 U.S. 68. On March 24, 1959, the proceedings were reopened for further hearing.

On July 24, 1959, by order in docket No. 33145, we initiated prescriptive action under section 20 of the act requiring detailed reports from the respondent railroads to facilitate more accurate computation of freight car, per diem charges, and ordered an investigation pursuant to section 1(14)(a) with a view toward ascertaining the need for establishment of reasonable rules, regulations, and practices with respect to determining the compensation to be paid for the use of carrier-owned freight cars not owned by the using carrier. All rail carriers subject to part I of the act were made respondents. At the same time, the proceedings in docket Nos. 31358 and 33145 were assigned for hearing on a consolidated record.

Prior to June 10, 1953, most of the defendants in docket No. 31358 were parties to an agreement which provided the organization and method by which the daily rate of compensation was to be established. This agreement had been approved by the Commission pursuant to section 5a of the act, and became effective on October 7, 1950.[4] On June 10, 1953, these defendants withdrew from the agreement insofar as it concerned per diem rates and, following the increase to $2.40 on August 1, 1953, notified other lines that they would not pay the increased amount.[5] Thereafter they continued to receive and deliver cars of other lines but paid rental at a lesser rate, generally in the vicinity of $2 per day. They have continued this practice with respect to the rates as subsequently increased.

[4] *Association of American Railroads—Agreement*, 277 I.C.C. 413; *Ahnapee & W. Ry. Co. v. Akron & B. B. R. Co.*, 300 I.C.C. 73, 302 I.C.C. 265. This agreement provides for use of the services of the General Committee of the Operating-Transportation Division of the Association of American Railroads, and the board of directors of that organization, to make studies and recommend establishment and changes in rates, charges, rules and regulations governing per diem, mileage, demurrage and storage. Rates submitted to the members of the agreement by the AAR board of directors are effective only upon majority vote of the members but the close identity between the membership of the agreement and that of the association, together with the use of the association's facilities and committees to administer the provisions of the agreement, have resulted in the rates being generally referred to as AAR rates. For convenience, they will be so designated in this report without suggesting, however, that the legal distinction between the two organizations is not valid.

[5] The first railroad to refuse payment was the New York, Susquehanna & Western Railroad Company which was not a party to the agreement. Its refusal took place on March 16, 1951, and is the only one which involved payments under the $1.75 and $2 rates. Subsequent to the institution of proceedings in docket No. 31358 this defendant changed management, paid arrears at the rates assessed and has since paid the assessed rates. No issue thus remains with respect to the rates preceding the $2.40 rate.

Following the institution of proceedings in docket No. 31358 there were filed in the United States District Court, Southern District of New York, 109 complaints, consolidated by the court for all purposes, wherein numerous railroad plaintiffs seek to recover from the New York, New Haven and Hartford, and the Boston & Maine, for the use by the defendants of plaintiffs' cars at a rate of $2.40 per day from August 1, 1953, through December 31, 1956, of $2.75 from the latter date to December 1, 1959, and since then of $2.88,[6] less interim payments of about $2 per day made under temporary settlements. The defendants answered contending, among other things, that the claimed rates were unreasonably high and counterclaimed for the difference between the amounts actually paid and any lesser amounts which might be found reasonable. *Baltimore & O. R. Co.* v. *New York, N. H. & H. R. Co.*, 196 F. Supp. 724, 726-727 (1961). On June 15, 1962, the court disposed of several motions and directed entry of partial interlocutory summary judgment in favor of 21 of the plaintiffs extending only to a declaration and adjudication that they are entitled to recover per diem in such amounts as are ultimately found by the court to be due them:

*** * * based upon a rate to be found just, fair, reasonable, and nondiscriminatory by the Interstate Commerce Commission, of which said Commission shall advise this court and thereafter to be ultimately determined and fixed by this court for each month beginning with August 1953 to date to be computed with interest.**

The order provided for grant of partial judgment for the remaining plaintiffs. Entry of final money judgment was stayed pending our determination of the controversy in docket No. 31358 or until further order of the court. By order entered on December 19, 1962, leave was granted to amend the complaint in this proceeding so as to request the Commission to furnish the desired findings.

The Illinois Central Railroad Company, one of the complainants in docket No. 31358, is a defendant in two suits pending before the Supreme Court of the State of New York, county of New York, captioned, in part, in one case, *Boston and Maine Railroad* v. *Illinois Central Railroad*, index No. 115/59, and, in the other, *New York, New Haven, and Hartford Railroad Company* v. *Illinois Central Railroad*, index No. 70/63. In each case, the plaintiff sued

[6] Whether these proceedings include charges accruing thereafter, or include charges based upon the multilevel rates, effective January 1, 1964, are not of record. A few of the suits have been settled by agreement of the parties.

the Illinois Central for interline freight balances and it counterclaimed for per diem balances. In dismissing the Boston and Maine's motion to dismiss the counterclaim against it and for summary judgment, the court deferred ruling on the counterclaim to await advice from this Commission as to what per diem rates it would find lawful. Accordingly, the complainants in docket No. 31358 filed an amendment of the complaint praying that the Commission, without regard to the proceeding in docket No. 33145, advise not only the United States District Court for the Southern District of New York, but also the aforementioned Supreme Court of the State of New York in the cases there pending, what per diem rate was just, fair, reasonable, and nondiscriminatory for each month beginning with August 1953, to date, and in so advising the court, find and declare that a rate no less than each of the rates in issue in docket No. 31358 was, during the period each was in force, just, fair, reasonable, and nondiscriminatory.

On March 2, 1964, Southern Railway Company and its affiliates filed a complaint with this Commission (docket No. 34405), pursuant to section 1(14)(a) of the act, against the Pennsylvania Railroad and numerous other railroads, as defendants, challenging the validity of the multilevel per diem rates which had replaced the $2.88 rate, effective January 1, 1964, and praying the Commission to fix for the future, reasonable rules, regulations, and practices respecting freight car per diem service including the compensation to be paid and the basis therefor. Consolidation of the proceeding for hearing with those in docket Nos. 31358 and 33145 was requested and granted.

On March 6, 1964, the Commission granted complainants in docket No. 31358 leave to further amend their complaint so as to bring in issue the multilevel rates which had become effective on January 1, 1964.

We have heretofore observed that the performance of orderly and efficient transportation service by rail will be improved by uniform observance of per diem charges by all carriers. *Association of American Railroads—Agreement, supra.* That conclusion is unmistakably confirmed by the record in these proceedings. The examiner recommended that the railroads continue to administer per diem through the facilities of the per diem agreement, and that the Commission not enter an order at this time which would supersede the procedures and the rights of the parties to that agreement. Upon consideration of the entire record, and the pleadings subsequent to the examiner's report, we find the necessary accord among all participating railroads to be lacking. Our

order herein will, therefore, provide for specific per diem rates and procedures applicable to all railroads and will supersede any existing procedures which are inconsistent herewith.

## Issues

The issues presented by the above-described proceedings are whether the rates charged at various times over the past decade and a half by car-owning railroads for the use of their cars by other railroads were just, reasonable, and compensatory as provided in sections 1(10), 1(11), and 1(14)(a) of the act; and if not, what rates would meet the standard for that period; and, what rate, rates, or method of establishing rates, will insure the satisfaction of that standard in the future. However, our findings in docket No. 31358 as to the reasonableness of the rates charged in the past are of significance only as an aid to the courts in settling the amount of damages in the pending lawsuits. For convenience, the parties to these proceedings are referred to herein as respondents, except where the context requires more specific identification.

## Background

During the early development of the railway networks which now cover the United States, it was customary for the individual lines to acquire freight cars necessary for their own operations, and to retain them in their own service. Where freight originating on one line moved to a destination on another, the lading was physically transferred from the car of the originating line to the car of the connecting line. As the railroads grew, this method of handling traffic proved uneconomical and it eventually became the general practice for the originating carrier to deliver its car to the connecting line for movement beyond without disturbing the lading. Cars involved in this interchange service with which the charges here in issue are concerned, are customarily referred to as "per diem" cars. Certain cars, such as refrigerator and tank cars handled under special arrangements, are not involved.

With the enactment of the Interstate Commerce Act, the then established custom of interchanging cars became obligatory on carriers where through routes were established. See *Missouri & Illinois Coal Co.* v. *I. C. R. R. Co.*, 22 I.C.C. 39, 44-45; *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U.S. 80, 91, 101-102; and *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 615. While

contributing to transportation efficiency, this method of operation created certain problems with which the industry has wrestled ever since.

The right of the car owner to compensation when its car is used by another line has frequently been recognized. See *Virginia Blue Ridge Ry.* v. *Southern Ry. Co.*, 96 I.C.C. 591, 593-594; *Morehead & North Fork R. R. Co.* v. *C. & O. Ry. Co.*, 100 I.C.C. 45, 48; *Jefferson & Northwestern Ry. Co.* v. *M., K. & T. Ry. Co.*, 102 I.C.C. 72, 75. Ascertainment of the amount of compensation and the manner in which it is to be assessed, however, has been subject to considerable experimentation and difference of opinion. In the late 1860's the rates were generally 1 cent per mile on cars of special construction, and 3/4 cent per mile on ordinary cars. They were established by various agreements between railroads, as no national association then existed. In the early 1870's a railroad in New England experimented with a combination mileage and time plan, and two central western carriers employed a rate of 50 cents per day between themselves. In 1888 a combination of mileage and per diem payment was attempted but abandoned after a few months due, among other factors, to the increased accounting costs. The straight mileage system was finally abandoned in 1902 and on July 1 of that year the flat daily rate system of charging became effective. See *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 374-375; *Chicago, R. I. & P. Ry. Co.* v. *United States*, *supra*. This method prevailed until January 1, 1964, when it was modified by providing a scale of daily rates varying with the value of the car. By 1920 the daily rate had risen to $1 per day, and by September 1, 1947, to $1.50 per day.

Subsequent increases were as follows:

| | |
|---|---|
| Effective November 1, 1949— | $1.75 |
| May 1, 1952— | 2.00 |
| August 1, 1953— | 2.40 |
| January 1, 1957— | 2.75 |
| December 1, 1959— | 2.88 |
| January 1, 1964— | multilevel rates |

The multilevel rates which became effective on January 1, 1964, were as follows:

| *Value bracket* | *Per diem rate* |
|---|---|
| (1) $1,000 and less | $2.16 |
| (2) 1,001 to 5,000 | 2.79 |
| (3) 5,001 to 10,000 | 3.58 |
| (4) 10,001 to 15,000 | 4.50 |
| (5) 15,001 to 20,000 | 6.15 |
| (6) Over $20,000 | 7.74 |

On April 1, 1965, following the close of the hearings in these proceedings, a further revision was made in the scale of multi-level rates, of which official notice is hereby taken. This revision substituted four new brackets for cars formerly covered by bracket No. 6, as follows:

| | |
|---|---|
| (6) $20,000.01 to $25,000 | $7.11 |
| (7) 25,000.01 to 30,000 | 9.00 |
| (8) 30,000.01 to 35,000 | 10.18 |
| (9) 35.00.01 and over | 12.18 |

If there were but two railroads, and each used the other's cars to the same degree, the payments would balance and it would matter little whether they were established at $1 or $100 per day. For those railroads today whose payments balance receipts within reasonable limits, the problem is quite similar. The actual situation however is far more complex for many carriers. Nearly all railroads are car owners, and all railroads are users of cars owned by the others. In 1960 there were over 100 class I line-haul railroads, over 300 class II line-haul railroads, and about 200 classes I and II switching and terminal companies and electric railways involved in these payments. The significant figures are the net payable balances and at any given time a carrier may be a net creditor as to one line, and a net debtor as to others. A line which is, in total amount, a net creditor line on an annual basis, may be in a net debtor position with respect to particular lines, and all these relationships can vary from month to month throughout the year. Railroads having a high ratio of originations of shipments to terminations generally occupy a net per diem creditor status. Those having a high ratio of terminations to originations are generally net per diem debtors.

### The Statute and Nature of Per Diem

Section 1(10) of the act defines "car service" as including the use, control, supply, movement, distribution, exchange, interchange, and return of cars by any carrier by railroad subject to

part I. Section 1(11) makes it the duty of every such carrier by railroad to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service. Unjust and unreasonable rules, regulations, and practices with respect to car service are prohibited and declared unlawful. Section 1(14)(a) authorizes the Commission, after hearing, to establish reasonable rules, regulations, and practices with respect to car service, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any car not owned by the carrier using it.[7]

In prescribing the compensation for the use of foreign cars pursuant to section 1(14)(a) of the act, the Commission is exercising its statutory authority to establish basic per diem predicated upon costs. The owner of a car, required to release possession thereof to another carrier for the further transportation of the freight it contains, may not be deprived of its use without compensation. On the other hand, the carrier obtaining the use of the car is required to accept possession for the purpose of continuing the transportation, and may not be required to pay therefor more than the average cost it would have incurred as owner of the car or by use of its own car. The two requirements cannot be met except by calculation of the average ownership burden based upon costs, measured with such accuracy as is reasonably possible and distributed among the car users and owners in a manner which can be found most equitable to all. We agree with the conclusion of the examiner that the "compensation" mentioned in section 1(14)(a) of the act relating to "basic" per diem does not include any element of profit to the owner of the car and may not be measured by the benefit which the user derives from use of the car. Per diem charges are in the nature of a reciprocal charge and are designed to represent the average cost of car ownership. The charge should be equivalent to the average car ownership costs which the users would have to bear if they owned the car. See *Virginia Blue Ridge Ry.* v. *Southern Ry. Co.*, *supra*; *Jefferson & Northwestern Ry. Co.* v. *M., K. & T. Ry. Co.*, *supra*; *Marcellus & Otisco Co.* v. *N. Y. C. R. R. Co.*, 104 I.C.C. 389, 392, *Rules for Car-Hire Settlement*, *supra*; *Keith Ry. Equipment Co.* v. *Assn. of American Railroads*, 274 I.C.C. 469, 482; *Palmer* v. *United States*, 75 F. Supp. 63. "It has long been generally recognized that car hire, however established, should be

[7] Customarily referred to as a "foreign car."

enough reasonably to compensate the car owner for its costs of ownership and no more * * *." *Boston & Maine Railroad* v. *United States*, *supra*.

This conclusion is confirmed by the 1966 amendment to section 1(14)(a) and the statutory history relating thereto. The basic per diem charge may not be used, or include sums as elements of compensation, to enforce car service rules, encourage car acquisition, et cetera; these functions being reserved for the added incentive element when found justified. As amended by Public Law 89-430, section 1(14)(a) now provides, in part:

> In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

In its prior form, this statute also required the compensation to be reasonable and we do not view the added language as making any change in this respect.[8] As a result of this amendment, however, the function and composition of basic per diem rates have been clarified. They are applicable to per diem cars generally, and are to be computed solely on the basis of elements of ownership expense involved in owning and maintaining the cars, including a fair return on value. Per diem charges may not include any amount for the value of the use of a car. See Cong. Rec.—House—May 12, 1966, page 9946.

There is sound reason why these per diem charges should constitute no more than a sharing of cost. We are not concerned with the problem of calculating proper charges to customers of the respondents, but with the assignment among a group of carriers engaged in multitudinous joint ventures, of the burden of acquiring and maintaining the vehicles used by all. Not only is their use compulsory

[8] Thus at Cong. Rec.—House, May 12, 1966, page 9945, "The amendment first restates in clear language what the courts have held to be the limitations of the law as it is now written."

on the paying line but a great deal of the use which is made and for which charges are paid is not productive of revenue to the user. This occurs on empty return of cars to owners which, in many instances, is accomplished by carriers who did not participate in the loaded revenue movement which took the car off line. The relationship of the parties is not that of a lessor and lessee, and the term "rent" frequently employed to describe the per diem charge does not connote such a relationship.[9]

## Costs

Upon reopening of docket No. 31358, we instituted the investigation proceeding, docket No. 33145 and incorporated therein an order under section 20 of the act, requiring the filing of special reports by all railroads. These reports were analyzed by staff personnel of our Bureau of Accounts and a series of cost computations were made which were thereafter served upon all parties and submitted in evidence. We adopt as a correct statement of the facts, the description by the hearing examiner of these reports and computations, and of those employed by the AAR staff in developing the per diem rates adopted by the members of the per diem agreement. The pertinent portions of the examiner's report are set forth in the appendix to this report.

Generally recognized as the largest single item is the group of costs properly attributable to the repair and maintenance of cars in interchange service. After consideration of the various criticisms directed to the cost calculations prepared by the Section of Cost Finding, Bureau of Accounts, the examiner concluded that the ownership costs developed by the studies, apportionments, and analysis, for maintenance and repair of freight cars and associated facilities for 1960, were as accurate as could reasonably be obtained and fairly represented the total ownership costs for the year.

Car repair costs and associated maintenance expenses, as developed by the 1960 Section of Cost Finding studies and analysis are as follows:

[9] In the instance where a carrier makes use of a foreign car for movements in violation of the car service rules, it can more reasonably be said that it is "renting" the car. Conceivably, a higher charge would be appropriate in such instances but this is a problem having to do with penalty charges to enforce the car service rules, not with compensation to the owner for the ownership burden.

| | |
|---|---|
| 1. Freight-train car repairs including allocation of inspection costs, nonrevenue freight, overheads, maintenance of shops, power plants, work equipment, miscellaneous equipment, and switching bad order cars. | $583,715,117 |
| 2. Depreciation on freight-train car repair facilities computed on undepreciated original cost. | $8,023,021 |
| 3. Property taxes on car repair facilities. | $3,824,341 |
| 4. Payroll taxes | $28,140,156 |
| 5. Return on investment in freight-train car repair facilities computed at 4 percent (after income taxes) on depreciation original cost | $11,489,897 |
| 6. Return on working capital | $2,896,316 |
| Total | $638,098,858 |

This total cost, divided by the 1,641,200 average number of per diem freight train cars in service in 1960 produces an average repair and maintenance cost per car of $388.80. Exceptions to the examiner's report do *not* challenge the method or accuracy of this computation insofar as it calculates the total ownership cost of repair and maintenance, but are directed to the apportionment of those costs between home and foreign cars and the development of an amount referred to as the "repair deficiency."

A great deal of repair work is accomplished on foreign cars by using railroads. Repairs made necessary by improper use and handling of the car are not considered ownership responsibility items, and the costs are customarily borne by the responsible railroad. For the purpose of computing per diem rates, ownership repair costs are those made necessary by ordinary usage, and the maintenance normally required to keep the car in good operating condition. Interchange Rules of the Association of American Railroads provide specifically for the calculation of the amounts which owners are to pay users for repairs made by the latter. The figures used by the Section of Cost Finding in developing the total repair cost include all costs which were assigned as the responsibility of the owners, whether they were accomplished by the owners or by users. Initially the calculation of ownership cost was accomplished upon the assumption that owners had fully paid users, and had thus borne themselves all the costs of ownership responsibility repairs. Certain respondents contend that the amounts which owners pay to users for such repairs, pursuant to the AAR rules, are inadequate, and that the deficiency should be taken into account in calculating the ownership cost and resulting per diem rates. Of the $583,715,117 of total ownership responsibility repairs for the year 1960, as computed by the Section of Cost Finding, the distribution produced by the sample studies indicates that $186,482,539

was accomplished by user railroads and that $98,534,020 of this amount was not reimbursed to them by the owners. Distributed over the per diem days paid for by all U. S. railroads in 1960, the latter amounts to 41.417 cents per day.

Certain of the respondents challenge the accuracy of apportionments used in developing this "repair deficiency," and renew their objections to the refusal of the hearing examiner to receive certain exhibits related thereto. Also excepted to by other respondents is the refusal of the examiner to deduct the deficiency from total ownership costs before calculating the per diem rate.

The exhibits in issue were not submitted in compliance with the special rules of procedure established for the conduct of these proceedings and were properly excluded. In view of our conclusions with respect to the "repair deficiency" it is unnecessary to give further consideration either to these exhibits or to the challenged Section of Cost Finding calculations and apportionments. The determination of reasonable compensation to the owner of a freight car for the costs of purchase and maintenance of a car which it puts into per diem service is a problem distinct from the adequacy of payments it makes to other parties for performance of some of its responsibilities. The issue of setoff payments should not be allowed to becloud the solution sought in this proceeding. Introduction of contentions regarding the adequacy of reimbursements by owners would import into this case a secondary dispute, and put on trial the AAR method of establishing the standard charges between railroads for repair of each others cars.

In computing the ownership costs it is proper to take into account all expenses incurred in maintaining interchange cars in operable condition, other than user responsibility items. Whether the costs incurred by users in effecting ownership responsibility repairs are fully reimbursed to them under another set of rates and regulations made by the carriers' own organization is irrelevant. The methods used to compute those rates are subject to review and revision by the AAR, as found necessary. To compute and apply a fixed amount as a deduction from total ownership costs before calculation of the per diem rates would tend to freeze into its present mold the method used by the AAR in an entirely separate area.

Such a deduction requires the assumption that, in all cases, with respect to each owner, the total cost of repairs made by each user to cars of that owner exceeds by precisely the same amount the sum paid by the particular owner to the user as reimbursement under the AAR rules. No logical relationship was shown to exist

between the number of foreign car days on line on which per diem would be computed, the amount of repairs made, and the fixed amount of the deficiency allowance. The evidence with respect to car days and reimbursements is persuasive that application of the car-repair deficiency as a flat reduction in the per diem rate would produce an inequitable distribution among the carriers. Users who accomplish few repairs but have a relatively high proportion of foreign car days on line would receive excessive reimbursement, and *vice versa*. The impact upon owners would also be inequitable. Each owning line would suffer the same reduction in its per diem receipts, regardless of the line using its car. The effect would be to require owners to overcompensate users in some instances, while undercompensating other users.

Certain respondents contend that reduction of the per diem rate by application of the average amount of repair deficiency is no more than another application of average costing to a problem which admittedly must rely upon averages with respect to many items. The distinction, however, is that reliance upon an average in this instance is not required. Settlements of repair reimbursements are made regularly by and between individual carriers by billings for specific repairs. It is clearly possible, by making these billings properly renumerative in each instance, to effect reimbursement according to actual costs and avoid the inequities inherent in averaging.

The argument is made that allowahce of the repair deficiency is essential if equitable treatment is to be given user lines, and that to fail to make such allowance would constitute a taking of their property without due process. It is asserted that, since the total amount for which they were liable in 1960 was $594,541,744, and, since allegedly, they were not reimbursed for $98,534,020 of ownership repairs made by them, users have, in effect, already paid that much. The failure to deduct it before calculating the per diem rate allegedly requires them to pay it twice. The appeal to justice in this contention loses force, however, upon close scrutiny.

All of the several hundred carriers affected by these rates are users of cars of each other, make repairs on cars of others, and, to the extent that there is a deficiency in the reimbursement for the cost of such repairs, suffer therefrom. The record warrants the conclusion that the impact of the deficiency varies widely from carrier to carrier. Of all these carriers, only four contend that the deficiency should be calculated and subtracted from the

total ownership costs in determining the per diem rate.[10] None including these four, have attempted to have the AAR rates for reimbursement revised to eliminate the deficiency. Of the four which support the contention, only two, the New Jersey and New York and the Long Island Railroad, appear on this record to suffer from the deficiency. Both the Boston & Maine and the New York, New Haven and Hartford derive substantial benefits from the failure of the AAR rates to include all repair costs. A study of payments and receipts of 18 major railroads in connection with the B&M and the NY, NH&H, indicates that, in 1960, the B&M received a total of $57,848.75 for repairs it made to their cars and paid the same lines $162,117.08 for repairs they made to B&M cars. It is apparent that the B&M received the benefit of nearly three times its unreimbursed costs in repair costs on its cars which it did not reimburse.[11] The New Haven, in 1960, received $92,316.30 for repairs which it made and paid the same lines $309,913.27. It enjoyed the benefit of repairs to its cars at unreimbursed costs over three times those which it failed to recover under the AAR rates.[12]

Losses due to the repair deficiency are incurred only to the extent that a line makes more repairs to the cars of another than that other makes on its cars. Both the B&M and the New Haven are predominantly terminating lines, having available many more foreign cars than needed for their originations, and can employ some selectivity in their choice of cars to supply to shippers. Both exercise careful control over the amount of foreign car repair work undertaken. The B&M has a policy of making repairs to foreign cars primarily to put them in condition to pass safety tests of the AAR interchange rules. While there is some evidence that certain of the repairs made by other lines to the B&M cars might not have been considered necessary by that

[10] The Boston & Maine Railroad, New York, New Haven & Hartford Railroad, Long Island Railroad and New Jersey & New York Railroad.

[11] Using the 47.55 ratio of unreimbursed costs indicated by the Section of Cost Finding calculation (reimbursements $87,948,519—unreimbursed $98,534,020), the B&M failed to recover some $65,255.46 in costs of repair work it did on cars of other lines, but received repair work from them, on B&M cars, which cost $182,912.90 more than it paid.

[12] Of these 18 railroads, the B&M received the benefit of more repairs than it accomplished with respect to 15. Two of the remaining had balances of less than $300 and the other had a balance of less than $2,000. The New Haven had an unfavorable balance with respect to but one railroad, having accomplished repairs to Western Maryland Railroad cars some $7,045 more than that line effected on New Haven cars.

railroad, the record does not warrant a finding that unnecessary repairs are made to any measurable extent. The major originating lines have shipper demands for cars requiring the use of foreign cars which need repairs, not only for safety purposes but also to make them fit to handle the freight. These lines have not the extent of choice in cars to be supplied, and are obliged to make more light repairs than predominately terminating lines.

The Long Island Railroad, having no cars in per diem service, does not enjoy the benefit of the allegedly underpriced repairs. It and the New Jersey and New York Railroad are the only lines suffering a loss from this situation which seek to have it remedied by a reduction in the per diem charges. As computed for 1960, the reduction amounts to 45 cents per day spread over the per diem days paid for by class I line-haul roads, and about 41 cents per day if spread over the per diem days paid for by all U. S. roads. Figures assembled by 20 railroads for the year 1960 indicate that total payments by them to the Long Island for repairs to their cars were $33,321.19. Assuming the accuracy of the deficiency as calculated by the Section of Cost Finding this would indicate a possible unreimbursed amount, using the average figure, of $37,575. These railroads had over 400,000 per diem days of their cars on the Long Island. At the average deduction of 41 cents per day this line would receive an offsetting reduction in per diem costs of over $160,000, over four times the indicated loss. The record also shows that the Long Island, like all other railroads, incurs liability for repair of foreign cars which falls into the user class, and which it satisfies by returning the cars to the owners, paying the owners at AAR rates for effecting the repairs. It thus obtains certain benefits from the ability to pay for the repairs at the AAR rates instead of making the repair itself at higher cost. While this class of repair work is not part of ownership costs included in the car rental charges, its existence cannot be ignored in considering the extent to which carriers suffer from the limitations on reimbursement in the AAR rates.[13] The record does not disclose the extent to which benefits were obtained in this manner but it is apparent that even this railroad did not suffer unmitigated inequity from the lack of complete reimbursement for its expenses in repairing foreign cars. The

[13] For 1960, the Long Island received $7,185.42 from the New York Central for repairs to the latter's car, but paid that line $13,842.48 for user repairs on NYC cars for which the Long Island was responsible. It thus received the benefit of nearly twice the amount of deficiency that it suffered on the repairs it made.

experience of the New Jersey and New York Railroad in this respect is not shown.

All other respondents oppose use of the deficiency as a deduction from the per diem rate. The B&M and New Haven, which contend that use of the deficiency in this manner, appear to have benefited from the existence of the deficiency, and it is clear that they would experience less favorable repair balances if the AAR rates were increased to the extent necessary to eliminate the apparent deficiency. If, however, the deficiency is deducted from the per diem charge, these lines will obtain a further benefit. Since they are per diem debtors, such a reduction, like any other action having the effect of reducing the rate, would lower the net balance payable by lines in this position. The consequence would be that these lines, which have already enjoyed the benefit of having their cars repaired at savings in cost exceeding the losses they sustained in making undercost repairs to other cars, would receive a second benefit from deducting the deficiency from their per diem bills. The other lines, on the other hand, would suffer a double loss. It cannot be found that failure to deduct the deficiency from the per diem rate would result in a taking of property without due process from the parties seeking this relief.

Upon all the evidence, it is found that the car repair deficiency, to the extent that it actually exists, should be corrected by adjustment in the AAR billing rates, and that any attempt to compensate for the deficiency by a deduction from the car rental charge would be unreasonable.

The analysis employed in developing the repair and maintenance costs of per diem cars by the Section of Cost Finding is based upon more recent data than that employed in the analysis used by the AAR. (See appendix.) As hereinafter discussed, the various ratios and apportionments developed by the 1960 studies are, in large part, useable in the calculation of costs for other years under this method. Insofar as the development of total ownership cost of repair and maintenance of per diem cars is concerned, no persuasive objections to its adoption have been shown. Upon the record, we find that, subject to adjustments hereinafter mentioned, the total per diem ownership repair and maintenance costs developed by use of the method appearing as schedule I of the Section of Cost Finding analysis fairly and reasonably measures the amount for which owners should be reimbursed. We shall require that this method be employed in the

calculation of per diem ownership repair and maintenance costs for the purpose of setting per diem rates in the future.

Property taxes on freight cars are so varied from State to State and for various periods as to make precise measurement impracticable. The amount is estimated by both the AAR and the Section of Cost Finding by use of a factor developed by taking a ratio of all property taxes to total investment and applying this ratio to the investment in freight cars. In recent years the ratios have varied from slightly under to slightly over 1 percent. We find that this procedure results in a just and reasonable allowance for this expense.

Compensation to the owner for the burden which is assumed in purchasing or building the car has customarily been calculated, on an annual basis, by including an amount representing the depreciation charges for 1 year and an amount representing an interest return on the undepreciated balance of the cost. In the calculations underlying the AAR rates prior to 1953 the average original cost of all cars as the base for depreciation was used. In subsequent years the base employed was the average original cost adjusted by an index designed to produce what has been called reproduction cost. Straight-line method of depreciation has been used, at the average rates used by carriers and authorized by the Commission, approximating 3.0 percent. In effect, this has amounted to an allowance of 10 percent of car cost as salvage value and a spreading of recovery of the remaining 90 percent over an assumed life of about 30 years. Beginning with the studies underlying the $1.50 rate in 1947, the base used to compute interest was the average of depreciated original cost and depreciated reproduction cost of the average car in the fleet. In studies underlying the $2.75 and later rates, depreciated reproduction cost was used as the base. In all instances, interest was computed at 6 percent before taxes.

The present multilevel system of per diem rates also provides for investment costs by including amounts for annual depreciation and interest on the undepreciated balance of the cost. Under this system, the cars are grouped in nine brackets, six of which cover spans of $5,000, one a span of $4,000, one a span of $1,000, and the last, all cars costing over $35,000.01. Cars are placed in a bracket according to their original cost plus additions and betterments, depreciated. The rate applicable to all cars in each bracket, however, is based upon allowances for depreciation and

interest using the weighted average of the reproduction costs of the cars.

The analysis prepared by the Section of Cost Finding in these proceedings used original cost as the base for depreciation and depreciated original cost as the base for interest charges. Straight-line depreciation was used at a rate of approximately 3 percent. Interest at a rate of 6.62 percent before taxes, equivalent to 4 percent after taxes, was allowed on the depreciated original cost. Southern Railway seeks the use of a shortened depreciation period of 14 years while, on brief, certain other respondents contend that the 30-year period should be retained for cars in the 3 lower AAR value groups, but that a shortened period of 20 years be employed for cars in the higher groups. No evidence was offered in support of the latter suggestion and we find that neither of the shorter periods are practicable at this time.

Attention is called to the fact that recent revisions of regulations of the Department of the Treasury may permit railroads to employ a 14-year period for calculation of charges to depreciation. Although it is argued that this represents a considered assessment by the Department of the realistic economic life of freight cars, the record does not support such a conclusion. Neither the revised regulations nor the factors which underlay the change in depreciation period allowances were shown. So far as appears on this record the change stems from a policy decision to encourage investment, and is applicable to a carrier only if it satisfies the Department that particular proportions of its capital are being renewed according to a prescribed schedule. Freight car value comprises only a portion of the total involved. The test is based upon dollar totals rather than with reference to the lives of specific equipment.

The record demonstrates that railroad freight cars are used for periods which greatly exceed the suggested periods of 14 and 20 years. There is no convincing evidence that railroad management generally considers cars to be no longer economically useful after these periods have expired. As of January 1, 1962, nearly 38 percent of the cars in service were over 20 years old, and over 49 percent were over 15 years old. Of 1,606,475 freight cars in interchange service, on January 1, 1962, 324,729, or 20.2 percent, were over 30 years of age. Over 13,000 of these cars had been in operation for more than 50 years. Ten years earlier, in 1952, the number of cars over 30 years was 315,938, or 17.92

percent of the total. No tendency to a reduction in the useable life of cars is indicated. While managerial views might differ as to the advisability of retaining some of the older cars, it is evident that car owners do not consider them unserviceable after 15 or 20 years of use. Nor can it be found that cars now being constructed will be subjected to any different treatment in this respect.

A further consideration which may not be ignored is the fact that the freight rates charged shippers, which are the source of income from which each user must pay its proportion of the costs of the service, generally are constructed with reference to costs of operation based upon a spreading of capital costs of revenue earning equipment over periods substantially longer than 15 years. While the amounts included as charges to depreciation and interest represent only a portion of the total considered in assessing the compensative qualities of freight rates, they are not insignificant.

The expected useful life of the car is a measure of the appropriate annual depreciation charge only when considered in connection with the portion of the cost to be depreciated. Deduction of 10 percent of the cost as the anticipated salvage value is a customary and convenient method of fixing the portion but it is not necessarily more reliable than other possible choices. The Section of Valuation and Depreciation of the Bureau of Accounts employs an estimated 17-percent salvage value and a 25-year life, which indicates an annual rate of depreciation of 3.32 percent. The total depreciation reported in railroad annual reports to the Commission in 1960 for freight cars was $205,740,270, of which $197,060,088 was assigned to per diem cars by the Section of Cost Finding analysis of the distribution of per diem and non-per diem cars. In addition, this analysis allowed $17,594,870 taken from Rail Form A calculation of normal depreciation applicable to per diem cars already amortized. The total of $214,654,958 amounts to 3 percent of the Rail Form A total original cost of these cars as of December 31, 1960, of $7,063,892,859. The record shows depreciation rates of freight cars currently in use by a number of railroads which range from 2.55 percent to 3.60 percent. We find that an annual allowance of 3 percent of the cost of freight cars as a portion of the costs employed in calculating per diem charges provides just and reasonable contribution by car users and adequately provides for reimbursement of car owners for the loss in value of the car.

Railroads which buy or build cars today face a problem caused, in large part, by the radical change in the character and cost of

railroad freight cars which has occurred in the past 20 years. A gradual increase in the cost of producing standard cars would not by itself have produced so pressing a problem, so long as freight cars, on the average, were of a few general types and cost about the same to build and maintain. Such had been the situation for many years prior to World War II and, while increasing costs resulted in increasing the car rental rate up to the $1 per day which it reached in 1920, and at which it remained until 1945, there had appeared no radical variances in the average costs of cars in the fleet. This condition underwent a substantial change after 1945.[14] The problem of rapidly increasing costs has been augmented by the development of special types of cars, and special features for the protection of freight which, together with the trend to larger cars, has produced appreciable disparities in the costs of the various cars now in use. The differences in the original costs of modern cars have made unrealistic the application of a single, uniform per diem charge. In order to provide reasonable compensation to car owners, charges must be assessed which reflect, as accurately as possible, the particular acquisition cost of the car in use. At the same time, there also arises a need to exercise care in determining the amount necessary to reimburse owners for that cost.

Certain respondents contend that rates varying with car cost cannot be approved or prescribed due to the lack of reliable information as to the extent such cars vary in their repair cost experience and annual utilization. It is argued that the new, high-cost cars receive much greater use than the older cars, and should have their higher costs spread over a greater number of active days than the average of all cars. The increasingly higher investments required to acquire new freight cars in recent years, however, make it necessary to apply varying rates in order to compensate for the burden undertaken by owners of such cars. While some evidence indicates that the newer cars spend more time off line than old cars, and perhaps incur a greater number of per diem payable days by foreign lines, it does not support any finding that their overall utilization, both on and off line, is measurably different. It was not shown that any workable separation can be made between cars on the basis of value, which relates to utilization. No studies were made with respect to this alleged distinction in the car-day divisor and no basis exists for finding the average divisor inapplicable to cars in all value brackets.

[14] Between 1915 and 1945 the Bureau of Valuation cost index for Account No. 53, Freight Train Cars, rose 154 points, an average of about five points per year. Between 1945 and 1960 the increase was 365 points, or nearly 25 points per year.

A similar conclusion is required with respect to costs of repair and maintenance. If a significant difference exists, the age of the car appears to provide a more certain measure than the depreciated value currently assigned to the car. It cannot be found on this record, however, that any measurable progression in repair costs exists in relation to either the age or depreciated value of the car. Nor can it be found that the difference, if any, between the average repair cost and the actual repair cost of new or old cars, is so great as to make unreasonable the results reached by use of the average. We would not be warranted in disapproving rates varying with car cost merely because of the asserted possible differences in utilization and repair costs. If future studies demonstrate that measurable and significant differences exist, they should be brought to the attention of the Commission.

We consider ill-founded the contention that nationwide average costs should not be used in the calculation of per diem charges. This has been the industry practice for many decades, and in no other way can uniform charges be reasonably constructed. That the costs experienced by different car owners vary, and, as a result, the extent of their reimbursement through the per diem payment will vary, is a consequence which must be accepted if the uniformity in charges which we have found essential to orderly and efficient transportation by rail is to be achieved.

## REPRODUCTION COSTS

One of the major issues in these proceedings is the extent, if any, to which reproduction cost should be employed as the base for calculation of depreciation and interest. We have observed that equitable treatment of both car owners and car users requires that the actual costs be measured with such accuracy as is reasonably possible. If car owners are to be compensated for some additional amount, it is incumbent upon those asserting the same to establish the propriety of the payment.

It is common knowledge that the purchasing power of the dollar has been steadily reduced over the past 20 years. Many more dollars would be required to reproduce today a car originally built 20 years ago, and a car owner, receiving payments from car users in dollars of current purchasing power, does not receive the same relative contribution to the cost of the car as it made at the time of purchase. Had each user of the car been the original purchaser, it would be subject to the same erosion of the pur-

chasing power of the dollars used, and would reasonably be expected to bear a share of that erosion. The use of reproduction cost as a base attempts to translate into dollars of today's value the number of higher value dollars invested in the car, and to spread the impact of inflation over all users, including the owner. In principle, equating the per diem dollars contributed by users to dollars actually invested by the owner appears essential to fair compensation. Thus, to the extent that the per diem charge is comprised of reimbursement of such funds, the contribution of users to the cost should be measured in dollars of purchasing power equivalent to those invested.

Proponents of the unrestricted application of reproduction cost to the full cost of the freight cars have failed to show that this method of calculation provides a reasonable measure of the actual costs incurred. In periods of rising prices, borrowing shields an investor from decline in purchasing power. The risk of decline is borne by the lender and clearly no need exists to compensate the investor therefor. The evidence in this record requires the finding that carriers do not finance the entire cost of purchase or construction of cars out of railroad funds. Commonly the larger part of the needed amounts is obtained through various security devices, such as equipment trusts or conditional purchase agreements, wherein both the total amount to be paid and the rate of interest to be paid is fixed by agreement. Generally, the term for repayment of principal of such loans is about 15 years, with interest on the unpaid balance varying between 2 and 6 percent. The Section of Cost Finding studies in 1960 indicated an average interest rate on outstanding obligations of 3.849 percent. While the actual portion of the cost borne by owners in the first instance varies, the average approximates 20 percent.

Car owners are required to repay to the underwriters of equipment obligations only the same number of dollars originally provided. Repayment of principal and interest charges on these sums is effected in dollars of current value at the time of payment. The freight car owner incurs no increased liability to lenders due to the reduction in the purchasing power of the repayment dollars, and should not receive from users a contribution measured by this inflation. We find no justification for increasing these costs by use of a reproduction cost base. To compensate the owner for principal and interest which it must pay on obligations incurred to purchase the car, users should contribute no more than their proportion of the amount actually payable. These

charges are not based upon an inflated loan figure and should not be so inflated when passed on to users.

Where a car owner has paid part of the cost of a new car with its own funds, and recovers each year a portion of its investment from per diem receipts, the inclusion of interest on the unrecovered portion of the investment is designed to compensate for the interest which might have been earned on that amount in an equivalent alternate investment. No reason appears why that interest should be inflated with the passage of time by application of an index to the original amount invested purporting to represent the increased cost of building or buying freight cars. There is no basis in this record for a finding that possible alternative investments would have undergone any appreciation, or if they had, that the owners would have taken such advantage of it as to convert the amount into a higher figure upon which the same interest return would be computed. Interest on alternative investments would normally be received annually in the same general fashion as per diem payments, and thus undergo the same reduction in purchasing power.

We find that the construction of fair and reasonable per diem charges under modern conditions does require an allowance to car owners for the loss in purchasing power of corporate funds invested in the car. The annual cost of owning and maintaining per diem cars should include, in addition to repair and maintenance costs and provision for property taxes, a portion of the capital expended by the owner for its purchase, together with interest on the unrecovered balance, and amounts necessary to make payments of principal and interest on funds acquired through issuance of fixed liability securities to finance the purchase. Only the portion representing corporate funds invested in the car by the owner should be subject to the adjustment reflecting changes in purchasing power.

It is asserted that separation of the elements of acquisition cost in this fashion is a novel approach not considered at the hearings. The demand for increased charges based upon the use of reproduction costs, however, makes inevitable a determination as to the validity of this procedure. The order instituting docket No. 33145 identified the proceeding as an investigation under section 1(14)(a) of the act for the purpose of establishing reasonable rules, regulations, and practices with respect to determining the compensation to be paid for the use of carrier-

owned freight cars which are not owned by the using carrier. All parties were aware that the extent to which reproduction costs were to be used was one of the primary issues. The United States District Court had specifically identified this issue in remanding the proceeding in *Boston & Maine Railroad* v. *United States*, *supra*. Application of the reproduction cost index to a portion of the annual cost was the procedure used in the AAR calculations prior to 1953. There is nothing novel or unusual about its use here.

With the costs of modern cars rising and substantial portions of the price being financed, it becomes essential to a just and fair result that a reasonable measurement be made of the annual portion which is actually affected by inflation. In referring to a fair return on value, Congress did not intend that car owners were to be compensated for fictitious costs. Such would be the result of computing charges for depreciation and interest using the reproduction cost and depreciated reproduction cost, respectively, of the car, without consideration of the portion of the cost actually representative of the owner's investment. Unless we are to find that per diem charges shall be computed solely and directly on the original cost of the car, no choice exists but to consider the various means by which the funds are obtained to acquire cars and the extent to which they produce a real cost to the purchaser.

Much of the argument in support of a blanket application of reproduction cost is founded in a "value of use" concept which, as we have pointed out, is inappropriate for application to the activity with which we are concerned. It would require users, whether using the car in a joint move participated in by the owner, in a revenue move not participated in by the owner, or returning the car empty in a non-revenue move, to pay the owner the full amount, including profit, that the owner could get from on-line use of the car. The legislative history of the 1966 amendment to section 1(14)(a) clearly prohibits any allowance based upon this concept. See Cong. Rec.—House, May 12, 1966, page 9946.

Those respondents who support application of reproduction cost in full and use of higher rates of interest assert that these are necessary due to the failure of new, more attractive cars to be returned to the owner's line with satisfactory frequency. Experience of some railroads indicates that such cars spend a greater proportion of the year off-line than older, and perhaps less de-

sirable cars. The record is not in sufficient detail, however, to support findings with respect to the actual loss of remunerative use suffered by the owners in such cases. The higher days-off-line record of the newer cars may, to some extent, be the product of their prompt reloading and forwarding by the owner when received back from a prior movement. Pending changes in the car-service rules may result in improved return of cars to owning lines but, to the extent that an owner fails to obtain the amount of productive use of a new car reasonably to be expected in interchange service, in light of the requirements of its shippers, the answer is not to require all users of all cars to pay excessive charges. Improvement in car service rules and diligence in their enforcement is required.

Another ownership risk, for which compensation is sought by use of reproduction costs, is that associated with premature obsolescence due to traffic changes or technological progress, and that associated with reduced economic activity resulting in lack of revenue producing employment for the car. This risk, however, is already borne by all users, due to the manner in which the ownership cost is distributed. The car-day divisor excludes a large percentage of home surplus and bad order cars, on owner's lines, while the dividend includes the costs of all cars. The quotient is thus enlarged so as to spread over all days of active cars a rateable portion of the costs of cars for which current employment is not available or feasible. Owners having home cars on line, not in use by reason of the above-mentioned risks, receive in the daily car-rental payments for cars in active use a share of the costs of the idle cars.

We have found that the average investment by car owners in the original acquisition cost of cars is 20 percent and that, in general, the principal amount of equipment obligations is required to be paid in 15 years. While precise reimbursement of the ownership burden would require proportionate contribution of the costs of ownership in the same amounts and within the same period of time that they must be met by the owner, the record demonstrates that car owners have not generally viewed reimbursement with such precision as essential to equitable treatment. By spreading the recovery of capital costs over a 30-year period, the impact of car-hire charges on users has been mitigated and, although the immediate return to the owners has been somewhat lessened, the total receipts over the 30-year period have been greater than would have been received by using a

shorter period. In general, freight cars have been kept in active service at least that same length of time. Since all owners are users, and nearly all users are owners, the acceptance of this discrepancy between the manner in which the owner must meet the burden and the manner in which it is reimbursed, indicates an accommodation of interests which has produced a practical equity entitled to substantial weight in the disposition of these proceedings.

Where an owner finances a substantial part of the original cost of the car, and is required to meet annual payments of principal and interest spread over a period of 15 years, contributions from car users based upon a depreciation allowance spread over a period of 30 years require the owner to carry the difference between its payments and the annual contribution by users. This is additional contribution by the owner to the capital cost of the car which must be recognized. An allowance for interest on these added sums, and for inflationary impact thereon, is appropriate. The examiner concluded that reasonable compensation to owners would be accomplished by allowing interest and application of reproduction costs to 40 percent of the original cost over the 30-year period, and treating the remaining 60 percent of the original cost as funds upon which changes in dollar values had no impact upon car owners. In so doing he allowed car owners to recoup in the last 15 years for excess amounts paid by them during the first 15 years.

Table I, below, shows the approximate average annual costs per $1,000 of original cost where recovery of 80 percent is accomplished within 15 years, including interest at 4 percent; all other costs being spread over a 30-year period. Table II allows 60 percent as the financed amount and spreads all costs over the 30-year period.

In table I the reproduction cost index is applied only to the 20-percent average original investment of the car owner, while in table II it is applied to 40 percent of the original cost for the entire period.[15] In each table, taxes are spread over the 30-year period. Where 40 percent of original cost is treated as the investment of corporate funds by the owner, and 60 percent is spread over 30 years instead of 15, compensation by users during the first 15 years per $1,000 of original cost is approximately $200 less than shown on table I. This amount is more than

[15] The additional 20 percent is actually invested in yearly payments to the amortization of capital costs provided in the first 15 years.

recovered before the 20th year, however, and in subsequent years the additional amounts are sufficient to compensate for the use of the added fund.

Per diem charges constructed strictly in accordance with table I would result in substantial variations in revenues, with an excessive reduction occurring in the 16th year. We consider that charges generally constructed as shown in table II to be superior. The choice herein made is obviously not the product of exact measurement. Were the costs and apportionments involved herein susceptible of precise and indisputable calculations and application, there would be no need for recourse to this Commission. It is the existence of these numerous and extensive areas of imprecision, as well as the opposing theories as to methods of calculating and distributing the costs that make necessary the application of expertise and judgment. We find that allowance for inflation on 40 percent of the original cost over the 30-year depreciation period results in the payment by car users of just and reasonable compensation to car owners for the burden resulting from decreased purchasing power of their invested funds. See: *Chicago, R. I. & P. Ry. Co.* v. *U. S., supra; Chicago & N. W. R. Co.* v. *A. T. & S. F. R. Co.*, 387 U.S. 326 (1967). As pointed out in *Tank Car Allowances, Southern Ry. System*, 329 I.C.C. 466, 478, the distinctions in relationships of the parties require treatment of this problem which, while differing, is not inconsistent with our conclusions herein.

Calculations of certain parties which purport to support higher per diem charges by allowing reproduction costs on the car owner's increasing equity over the life of the car are not persuasive. This increasing equity is a benefit which accrues to the owner by virtue of the contributions of the users. If the car is off line the entire year, the entire additional equity beyond the original owner's downpayment is paid by users. No logical basis exists for requiring them to pay also additional amounts due to the subsequent depreciation in purchasing power of funds which they themselves contributed and which funds were themselves raised to adjust for such changes. That the car-obtaining line receives the benefit of sole ownership when purchase obligations are terminated gives it no additional right to payment from the others.

In fact, it is more common for cars to be off line only part of each year, and during the time they are on the owner's line

other railroads are not contributing to their cost. During these periods, however, the owner is the user and payments made by him on the purchase obligations perform the same function as contributions by other users. The end to be attained is the fair reimbursement of the owner for those amounts which it actually pays as owner, over and above contributions, or constructive contributions, which it makes in its capacity as user. The increase in its proportionate ownership of the car over the latter's operating life provides no measure of this amount. Notwithstanding the attempts made to suggest some differing relationship, we are of the view that the use of per diem freight cars is made pursuant to a relationship in the nature of a partnership, wherein all users, including owners, contribute their share of the ownership obligations, proportionate to the use made by them.

TABLE 1

Summary of investment costs—per $1,000 original cost 40 percent loans, [illegible] 15 years—variant No. 33 index on 50 percent cash 50 percent

| Year | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | Year numbers 3 4 5 6 7 | 5-Year average |
|---|---|---|---|---|---|---|---|---|
| | (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | |

TABLE II

Summary of investment costs - per $1,000 original cost account No. 52 under an
80 percent - reimbursement for years on all charges

| Line no. | Adjustment factor for appropriate for [illegible] | Adjustment recovery of owner's capital cost[1] | Interest on investment balance[2] | Reimbursement of principal of financed funds[3] | Reimbursement of interest charges on financed funds[4] | Reimbursement of property taxes[5] | Total columns 3, 4, 5, 6, 7 | 5-Year average |
|---|---|---|---|---|---|---|---|---|
| | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9) |
| 1 | 1.000 | 10.00 | 20.75 | 20.00 | 23.60 | 10.03 | 84.38 | ..... |
| 2 | 1.003 | 10.00 | 20.10 | 20.00 | 22.80 | 9.72 | 82.62 | ..... |
| 3 | 1.003 | 10.43 | 20.43 | 20.00 | 22.00 | 9.42 | 82.30 | 82.30 |
| 4 | 1.003 | 10.03 | 20.80 | 20.00 | 21.20 | 9.11 | 81.14 | ..... |
| 5 | 1.004 | 10.04 | 20.19 | 20.00 | 20.40 | 8.81 | 79.44 | ..... |
| 6 | 1.014 | 10.18 | 20.50 | 20.00 | 19.60 | 8.51 | 78.79 | ..... |
| 7 | 1.026 | 10.26 | 21.05 | 20.00 | 18.80 | 8.20 | 78.31 | ..... |
| 8 | 1.039 | 10.39 | 21.20 | 20.00 | 18.00 | 7.90 | 77.49 | ..... |
| 9 | 1.049 | 11.19 | 20.55 | 20.00 | 17.20 | 7.80 | 76.74 | ..... |

Summary of investment costs - per $1,000 original cost account No. 53 index on 40 percent-reimbursement 30 years on all charges—Continued

| Year in service (1) | Adjustment factor to compensate for inflation (2) | Adjustment recovery of owner's investment[1] (3) | Interest on investment balance[2] (4) | Reimbursement of principal of financed funds[3] (5) | Reimbursement of interest charges on financed funds[4] (6) | Reimbursement of property taxes[5] (7) | Total columns 3, 4, 5, 6, 7 (8) | 5-Year average (9) |
|---|---|---|---|---|---|---|---|---|
| 10 | 1.219 | 12.15 | 19.90 | 20.00 | 15.40 | 7.29 | 75.77 | ..... |
| 11 | 0.814 | 13.14 | 19.25 | 20.00 | 15.60 | 6.99 | 75.27 | ..... |
| 12 | 1.397 | 13.97 | 18.60 | 20.00 | 14.80 | 6.69 | 74.06 | ..... |
| 13 | 1.419 | 14.19 | 17.91 | 20.00 | 14.00 | 6.34 | 72.52 | 72.42 |
| 14 | 1.519 | 15.15 | 17.30 | 20.00 | 13.20 | 6.08 | 71.73 | ..... |
| 15 | 1.569 | 15.64 | 16.62 | 20.00 | 12.40 | 5.78 | 70.51 | ..... |
| 16 | 1.597 | 16.99 | 16.00 | 20.00 | 11.60 | 5.47 | 70.02 | ..... |
| 17 | 1.747 | 17.47 | 15.35 | 20.00 | 10.80 | 5.17 | 68.79 | ..... |
| 18 | 1.637 | 16.33 | 14.70 | 20.00 | 10.00 | 4.47 | 67.90 | 68.22 |
| 19 | 1.965 | 19.65 | 14.05 | 20.00 | 9.20 | 4.56 | 67.46 | ..... |
| 20 | 2.091 | 20.91 | 13.40 | 20.00 | 8.40 | 4.26 | 66.97 | ..... |
| 21 | 2.476 | 24.76 | 12.75 | 20.00 | 7.60 | 3.96 | 69.07 | ..... |
| 22 | 2.479 | 24.79 | 12.10 | 20.00 | 6.80 | 3.65 | 67.31 | ..... |
| 23 | 2.478 | 24.78 | 11.45 | 20.00 | 6.00 | 3.35 | 65.56 | 66.27 |
| 24 | 2.577 | 25.77 | 10.80 | 20.00 | 5.20 | 3.05 | 64.82 | ..... |
| 25 | 2.833 | 28.33 | 10.15 | 20.00 | 4.40 | 2.74 | 65.62 | ..... |
| 26 | 2.953 | 29.53 | 9.50 | 20.00 | 3.60 | 2.44 | 65.07 | ..... |
| 27 | 3.113 | 31.13 | 8.85 | 20.00 | 2.80 | 2.14 | 64.92 | ..... |
| 28 | 3.243 | 32.42 | 8.20 | 20.00 | 2.00 | 1.83 | 64.47 | 64.06 |
| 29 | 3.242 | 32.42 | 7.55 | 20.00 | 1.20 | 1.55 | 62.72 | ..... |
| 30 | 3.459 | 34.56 | 6.90 | 20.00 | 0.40 | 1.24 | 63.10 | ..... |
| Over 30 | ..... | ..... | 6.52 | ..... | ..... | 1.02 | 7.54 | 7.54 |

[1] Based on 1961 account No. 53 index of 529 for first year.
[2] Twenty percent of cost minus salvage divided by 30 years and multiplied by column 2.
[3] Interest on mid-year balance of 20 percent of cost as reduced by annual recovery of $3.81 at 4.52 percent per annum.
[4] Eighty percent of cost divided by 15 years.
[5] Interest on mid-year balance of 40 percents of cost as reduced by column 5 payments at 4 percent per annum.
[6] Taxes at 1962 figure of 0.016 multiplied by mid-year value of all taxes on original cost reduced 3 percent per annum.
[7] Forty percent of cost minus salvage divided by 30 years and multiplied by column 2.
[8] Interest on mid-year balance of 40 percent of cost as reduced by annual recovery of $1.076 at 4.52 percent per annum.
[9] Taxes at 65 percent of cost divided by 30 years.
[10] Interest on mid-year balance of 60 percent of cost as reduced by column 5 payments at 4 percent per annum.

The index of freight car costs used as a measure of the reduction in the purchasing power of the invested sums is the product of a joint effort by the Association of American Railroads and the Commission's Bureau of Accounts, Section of Valuation,[16] and is one of several established after analysis of major construction contracts, reports by carriers, and information furnished by equipment suppliers and manufacturers. Some 44 separate indices are published by the Section of Valuation and Depreciation to correspond with specific primary accounts of railroads, as listed in the Uniform System of Accounts for Railroad Companies. The index involved herein is that published for Account No. 53, freight-train cars. It purports to show the relationship of prices for each year subsequent to 1914, using the prices in the 1910-14 period as 100. The index for each year is a composite figure based upon the percentage of each type of car and equipment in the account.

While the record contains little by way of detail as to the construction of this index, the testimony of a former Director of the Commission's Bureau of Transport Economics and Statistics that, although extras are omitted, items such as wide doors, greater length, bigger volume, steel roller bearings, cushioned underframe, et cetera which are an integral part of new cars, are included in the average costs which underlie the index, was not contradicted. It also appears that the index includes other improvements which form integral parts of new cars such as improved metallurgical design of wheels, self-aligning trucks with one-piece cast steel bolsters, case steel side frames with integral journal boxes, stabilizing devices, snubbing features built into side frames, wear plates in critical wear areas, journal roller bearings, improved coupler designed and draft gears design advances.

In a period during which no appreciable changes occurred in the design, size, or equipment of freight cars, the Account 53 index of construction costs might be treated as a reasonably reliable measure of reproduction cost and, under average economic conditions, of changes in the purchasing power of dollars invested in freight cars. In periods such as we have experienced since 1946, however, we think this index must be treated with caution and indications of inflation resulting from its application to original costs employed only as approximations. The

[16] Alabama [illegible] Aberdeen & N. W. Co., 274 I.C.C. 383, 403; 332 I.C.C.

many changes in manufacturing processes, metallurgical developments, changes in design and structure, et cetera which have occurred are reflected to an immeasurable extent. Under these conditions, these approximations decline in validity as they are applied to more distant past years. Beyond a limited past period we are of the opinion that this index produces increases in reproduction costs which are so indeterminate as to render them unsatisfactory as measures of per diem costs. Thus, a more equitable method of allowing car owners to recover for the effect of inflationary forces is to make an appropriate increase in the rate of interest allowed on their invested funds, which approximates the impact indicated by the index in more recent years but modifies the indication for more distant periods. In the following calculations, capital charges have been computed in this fashion.

In addition to allowing application of the reproduction costs to 40 percent of the original cost, the examiner allowed an interest rate of 4 percent after taxes on the unreimbursed balance of 40 percent of the original cost. It is contended by some respondents that this was excessive, while others assert that it was too low. We do not find persuasive the evidence of interest on investment allegedly earned by car leasing companies, particularly in the absence of information as to the base on which it is earned, the accounting process which produces the asserted rate, and the extent to which an element of profit is contained therein. A most strenuous argument is made, however, that the per diem charge should contain an allowance for what has been referred to as "economic cost." In this respect it is argued that an allowance of 4 percent after taxes on that portion of the original cost of the car representative of the owner's investment of its own funds is inadequate. The cost of this "equity capital" is said to be much higher.

The general funds of the railroad company employed to make the investment in cars, in addition to retained earnings, are derived from long-term debt capital sources and proceeds from the issuance of stock. The cost of long-term debt capital is made up of the average yield, the premium necessary to attract buyers, underwriters' fees and corporation expenses of issuance

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and distribution, less credit for income taxes, expressed as a rate of interest on the principal amount. While we have required to be stricken certain evidence first offered in exceptions, we note that, even if received, it would not warrant a finding that the allowance of 4 percent after taxes is inadequate to cover the costs of this source of corporate funds. A similar calculation of the costs involved in raising capital by issuance of stock, covering the corporation costs of issuance and servicing, underwriters' and brokers' commissions and discounts, and the necessary underpricing, would develop the rate necessary to compensate for this item, but no evidence is of record on this point. For reasons hereinafter mentioned, we are satisfied that costs of this latter type will also be adequately compensated by the allowances herein made.

The substantially higher rate of interest measured by the "cost of equity capital," as this term is used by the proponents, is supported by a theory which was rejected by the examiner as a method appropriate to evaluation of investment choices but inappropriate for application to the per diem calculation. The "cost of equity capital" which we are urged to adopt is not the cost which the railroad must incur to issue and market the stock, but is the interest rate (the cost) which states the discounted cash flow return to stockholders in the form of dividends plus market appreciation, adjusted upward by a factor for underpricing, underwriters' and brokers' commissions, and corporation expenses. This "cost" purports to measure investors' expectations and provide a yardstick by which to measure the utility to the company of future capital investments, in order to hold earnings up to the estimated expectations of investors, thus insuring maintenance of the company's financial standing and ability to obtain future capital inflow at costs acceptable to its particular management. Obviously, this "cost" includes all the profit obtainable or desirable from operations of the capital investment under consideration. There is no evidence that consideration of prospective net per diem revenue is so significant a factor in the financial planning of railroads when considering investment in new freight cars as to require rates generated by the method put described. On the contrary, it must be found that freight cars are built to meet anticipated needs of shippers and to earn freight revenues, and that little consideration, if any, is given to the possible income from per diem payments in the

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decision to acquire cars. We find that the "cost" herein described may not reasonably be employed as part of the ownership cost of per diem cars for purposes of calculating the charges to users.

A rate of 4 percent after Federal income taxes is reasonably related to the return generally available from investments having similar risks. It compares with a return earned by railroads from freight service in 1960 of 4.5 percent after taxes and our conclusions in cases of similar reciprocal charges based upon cost, that 4 percent after taxes produced a fair return on value. *Switching at Richmond, Va.*, 245 I.C.C. 293, 298; *Switching Charges at Detroit, Mich.*, 301 I.C.C. 75, 82; *Routing Cancellation at Waterloo, Iowa*, 302 I.C.C. 477, 485. A fair return on the present value of the owner's investment requires consideration of the changes which are reflected in the Account No. 53 index of freight car costs and generally shown in tables I and II, *supra*. Employing this index as a guide, we conclude that interest at a rate of 9 percent before taxes on the portion of original cost herein allowed as representative of the average ownership investment, which produces approximately 5.5 percent after taxes, provides a fair return on the value of the investment, adequately compensates owners for the impact of inflation, and includes those elements of cost which should be shared by car users.

The average interest rate on outstanding equipment obligations developed by the 1960 studies was 3.849 percent. We agree with the examiner that a rate of 4 percent before taxes is reasonable for application to the portion of original cost of cars herein treated as funds not risked by the car owner and with respect to which the owner has a fixed liability. We find that allowance of 4 percent in this fashion is adequate on the average to reimburse car owners for interest payments which they must make on equipment obligations and constitutes just and reasonable compensation therefor.

The combination of an allowance of 4 percent on 60 percent of the original cost and 9 percent on the remaining 40 percent, produces a composite rate of 6 percent for application to the undepreciated balance of the original cost. A calculation based upon this figure appears subsequently herein as table B, and indicates cost which are closely related to those shown in tables I and II. The abrupt reduction in the 16th year shown in table I is avoided and, while charges are somewhat higher than table II in the earlier years, the speculative impact of the reproduction

cost index in the more distant years is mitigated. We find that an interest rate of 6 percent before taxes upon the undepreciated balance of the original cost of cars is just and reasonable compensation to car owners for all costs of interest on invested and borrowed funds, including a fair return on the value of their investment and allowance for losses in purchasing power of invested funds, under circumstances where per diem charges are calculated separately with relation to the actual original cost of cars.

COST BRACKETS

Compensation to owners would most nearly be accomplished by measuring the car rental rate for each car according to its particular cost. Such a method would require rate schedules so complex as to defeat their purpose, however, and some grouping of cars is essential to a practicable system. To be reasonable, the groupings chosen should be so constructed as to contain cars having values reasonably related to the value employed to compute the rate for that group. The groupings, or value brackets, employed in constructing the AAR multilevel rates are challenged as unreasonable both because of their size and because the rates applicable to some are weighted to reflect the preponderance of cars in the lower portion of the bracket. The analysis of 974,386 cars used by the AAR in developing these brackets and rates is set forth below. Values shown are based on the average original cost, plus additions and betterments, depreciated, as of December 31, 1961.

| Value group | Number of cars | Distribution |
|---|---|---|
| | | Percent |
| $1,000 and less | 380,851 | 100 |
| 1,001 - 2,000 | 150,160 | 39.94 |
| 2,001 - 3,000 | 112,112 | 27.38 |
| 3,001 - 4,000 | 77,716 | 19.16 |
| 4,001 - 5,000 | 66,406 | 16.52 |
| | | 100.00 |
| 5,001 - 6,000 | | |
| 6,001 - 7,000 | 53,031 | 24.58 |
| 7,001 - 8,000 | 49,439 | 22.90 |
| 8,001 - 9,000 | 54,951 | 25.50 |
| 9,001 - 10,000 | 36,218 | 16.89 |
| | 13,932 | 10.13 |
| | | 100.00 |
| | 332,140 | |

and of cars out of service due to repairs. The latter sample was subdivided so as to show separately cars on repair tracks undergoing or awaiting repairs, cars on repair tracks repaired and awaiting switching, cars on storage tracks awaiting switching to repair tracks, cars held in train yard awaiting movement to repair tracks, cars moving empty in trains en route to shops, cars stored awaiting disposition, and other cars.

Another 7-day sample was taken of surplus per diem cars, also subdivided to show the cause. Surplus cars were ascertained by a count of serviceable empty cars on hand at 12:01 a.m. of the next day following a test day which had not been placed for loading, and a similar count made 48 hours later of those same cars to establish the number which had not been placed for loading in the meantime. Another study called for a report from the carriers, subdivided by type of car, for the year 1960, showing per diem payments and receipts, and reclaim payments and receipts, together with a report of per diem receivable by type of car, for cars on railroads outside the United States.

In developing the car-day divisor for 1960, the Section of Cost Finding averaged the total freight train cars in service at the beginning and end of the year to obtain 1,685,910 cars. Analysis of the special studies and reports heretofore described developed that 44,710 of these cars were not in per diem service, leaving 1,641,200 as the average number of per diem cars in service in 1960. There was thus indicated a possible 600,679,200 car days of per diem cars for the year. The studies of bad order cars and surplus cars developed deductions of 59,029,930 car days and 68,565,413 car days, respectively, owing to these two causes. The balance of 473,083,857 active car days, divided by 1,641,200 cars in service, produces 288.25 active car days per car for the year 1960.

The active car days per car furnishes a measure of the days, on an average that each car was engaged in revenue producing service but it is not a satisfactory measure of the days over which ownership costs should be spread. Per diem payments by users of foreign cars are made, with unimportant exceptions, for each day a foreign car is on line, whether or not in a surplus or bad order category. Payments are thus made for days excluded in the calculation of the total active car days. Since car owners are users of their own cars and, when in such capacity, should bear the user's share of ownership costs, fairness to all users requires that total ownership costs be

spread over the total days for which payments are or should be made. The 1960 studies indicated a total of 223,887,324 active car days of per diem cars on foreign lines, and a total of 237,908,943 days for which per diem was paid for such cars. The indicated ratio is 1.06263. Application of this ratio to the total active car days of all per diem cars in 1960 produced a car-day divisor of 502,715,000 per diem payable days, or about 306 per diem payable days per car for that year. Development of the car-day divisor in this manner credits all users, including owners when using their own cars, with the same relative proportions of surplus and bad order car days, while excluding the great majority of surplus and bad order car days of cars on home lines. Costs of the home bad order and surplus cars are thus spread over the payments made for the cars in use.

Certain respondents contend that distribution of the annual car costs should be accomplished by use of a car-day divisor developed by application of a fixed ratio of active cars to all cars, and recommend that 80 percent be established as the ratio to be applied. We are satisfied from the record that the car-day divisor is a factor of such significance in the distribution of per diem costs as to require more care in measurement. The determination to be made is the cost per day, to be employed to measure the adequacy of the existing rates and the need for any change. It is essential that the car utilization for the specific years be employed and no sound basis is shown for ignoring it. Its importance is underscored by evidence which indicates that further studies may demonstrate a need for use of different divisors for cars of varying types or values.

The car-day divisor employed in developing the AAR rates has been constructed by multiplying the 20-year average of the annual ratios of active to total cars by the number of days in the year to obtain the active car days per car per year. The figure for active cars has included all cars owned or leased in the year less bad order and surplus cars on lines of owners. For application to the total costs, the active car days per car has been multiplied by the average number of cars in use during the year. Surplus cars, both home and foreign, are based upon estimates of the empty cars on hand at loading stations at the end of each day in excess of the number needed for loading the next day. The portion thereof estimated as being foreign cars is determined, and excluded, by application of a percentage based upon a 7-day test check made in 1956,

the validity of which was not shown. Based upon a test check in 1949, the reported bad order cars are adjusted by a percentage to reflect home cars in this category not reported in regular AAR reports. Accuracy of this adjustment was not shown. The divisor also includes cabooses and other cars not used in per diem service. We find that the procedures used in the 1960 special studies are more reliable and productive of more accurate development of car-day divisors.

The 1960 studies developed the ratio of per diem payable days to total active car days by use of the days for which per diem payments were made for foreign cars. The studies showed that this figure was substantially the same as the total car days of foreign cars, the difference being about four-tenths of 1 percent. We find that the total car days of foreign cars may be employed to determine the ratio of constructive per diem payable days to total active car days of all per diem cars, and that it is unnecessary to develop separately the per diem days paid for foreign cars for this purpose. The total per diem payable days for the year under consideration shall be determined by multiplying the total active home and foreign per diem freight train car days by the ratio which the total foreign per diem car days, both serviceable and unserviceable, bears to the total active foreign per diem car days. The per diem payable days per car to be used as the car-day divisor for the year under consideration shall be determined by dividing the last-mentioned figure by the average number of such cars in service in the year.

The procedures herein prescribed require also the calculation of a car-mile divisor in order to equitably spread the costs attributable to line-haul mileage. The 1960 studies suggest that variations may occur in utilization depending upon the type of car but the evidence of record is not sufficient to support findings with respect thereto. We conclude that, for the present, the average car-mile divisor, based upon the experience of all active per diem cars, must be employed. The respondents may, if they deem it necessary, bring to our attention evidence of a need for separate determination of car-mile or car-day divisors.

The total line-haul car-miles of per diem cars in 1960 developed by the special studies was 21,264,599,477. Divided by the average number of such cars in active service, 1,641,200, indicates an average per car for the year of approximately 13,000 miles. We find that the car-mile divisor applicable to

per diem cars shall be determined for the year under consideration by dividing the total loaded and empty car-miles of per diem freight train cars by the average number of cars in service in the year.

Changes in economic conditions and demands for railroad service produce variations in the number of active car days and average line-haul miles per car from year to year. Since these figures are the divisors which reduce the annual costs to the daily and per-mile rates applied to each car, they are critical to the process with which we are concerned. It is generally accepted that frequent and violent revisions of the per diem rate are not desirable. An important consideration is the fact that while a high rate of economic activity increases the active day and mileage divisors so as to produce a lower rate, a period of recession has the opposite effect. In the latter instance, the divisors might be so reduced as to result temporarily in substantially increased rates, a consequence which is similarly undesirable. Mitigation of such possible extremes is accomplished by using average conditions. The AAR has experimented with the use of 5-, 10-, 15-, and 20-year periods to estimate the car utilization to be anticipated in the future, but there is no evidence that these periods measure the average of current car demand conditions or the norm of economic cycles.

In the light of current conditions and the continuing improvements in railroad operations and equipment, a shorter period should be more reliable and responsive. We find that a 3-year moving average will be adequate to absorb temporary fluctuations in economic conditions while reflecting longer term changes in utilization and costs. It will be employed herein to determine the car-day and car-mile divisors, and the average annual cost of repair and maintenance.

### METHOD FOR FUTURE CALCULATION

We find that just and reasonable per diem rates shall hereinafter be calculated in the following manner and subject to the following instructions.

Per diem rates shall be calculated using data for the last calendar year, and for the 3 most recent years as herein prescribed, to develop necessary statistics. Whenever such calculations indicate a need for revision of the rates, the fact shall promptly be brought to the attention of the Commission.

For the purpose of the per diem calculations, freight cars shall be classified according to the original capitalized cost, without allowance for depreciation, subject to the Commission's accounting regulations. Where cars are rebuilt and assigned new car numbers, the original cost shall be the cost as capitalized pursuant to current accounting regulations. Per diem rates shall be so calculated as to reflect differences in the original cost of the car, and differences in the annual ownership costs due to the age of the car in service. Original cost brackets shall be $2,000 in scope, as shown in the following computations (table C). Brackets covering age in service shall be 5 years in scope, as shown in the following computations (table B).

Age in service shall be calculated as follows:

(1) Cars installed prior to July 1 of any given year shall be considered to have commenced their first year in service on the preceding January 1;

(2) Cars installed after June 30 of any given year shall be charged at rates applicable to the first 5 years of service until the expiration of 5 years from the following January 1.

Per diem rates shall be separately calculated, assessed and paid with respect to the number of days cars are held on line, and with respect to the number of miles such cars are moved by users in line-haul service, such calculations to be made in conformance with principles and methods found herein to be just and reasonable. Respondents will be expected to take appropriate action to accurately record days on line and line-haul mileage of foreign per diem cars. Days shall be reckoned by subtracting the date of receipt from the date of delivery. The day of receipt shall be disregarded and payment made for the day of delivery. A road receiving and delivering a car on the same date shall not pay the daily per diem charge for that day but shall pay the appropriate charge for the line-haul mileage.

The rate applicable to each original cost bracket, except the first, shall be that applicable to the middle thousand-dollar figure thereof, herein referred to as the bracket figure, as shown in the tables which follow. The amount of annual depreciation, or recovery of original cost, of cars in each bracket shall be 3 percent of the bracket figure. Forty percent of this annual cost shall be assigned to line-haul mileage, and the remainder to the daily charge (table B).

A fair return on value shall be recovered annually by allowance of interest on invested capital. The total amount, including interest costs on freight car obligations, shall be assigned to time and shall be taken at 6 percent of the average undepreciated balance of the original cost for each 5-year period for which charges are computed (table B).

The total amount recoverable annually on account of property taxes shall be assigned to time. The ratio which all property taxes for the most recent year bears to the total railroad investment for that year shall be employed to estimate this item. The amount shall be determined by application of this ratio to the midyear value based on depreciated original cost for the middle year of each time period (table B).

The total amount recoverable annually on account of repair and maintenance costs shall be taken as the same for all cars and shall be apportioned 50 percent to time and 50 percent to line-haul mileage. All costs which are treated herein as overheads on repair costs shall be apportioned between time and mileage in the same fashion as repair and maintenance costs.

The method employed by the Section of Cost Finding to ascertain repair and maintenance cost in its analysis of 1960 cost data is based upon the most recent information with respect to extent and allocation of the various items and is embodied in summary form in a publication entitled Rail Form H, 7—62, Formula for Use in Determining Per Diem Charges For the Use of Freight-Train Cars. This form, introduced in evidence as exhibit R—5, is available to any interested person through the Bureau of Accounts of the Commission.

Employing data from Rail Form A for the year under study, and ratios and apportionments from the 1960 studies, schedule 1 of Form H separates the annual costs between per diem freight train car ownership costs, other expenses, and general overheads. Footnotes to schedule 1 contain forms to be used to calculate payroll taxes, property tax ratio, cost of handling nonrevenue freight, costs of switching bad order cars, return on investment in property other than freight-train cars, and return on working capital.

Repairs to freight train cars, account No. 314, were apportioned 75.334 percent to ownership costs based primarily on the Forms 2 and 3 studies in 1960. Other 1960 ratios and apportionments to ownership costs in schedule 1 include:

| | |
|---|---|
| Account No. 302—Repair, shop machinery | 34.170% |
| 304—Repair, power plant machinery | 22.203% |
| 305(44)—Depreciation, shop machinery | 34.170% |
| 305(45)—Depreciation, power plant machinery | 22.203% |
| 503—Hire of freight cars (net) | |
| 536—A. R. schedule 376, lines 7, 8, 9, columns c, d, e, f | 73.752% |
| 235—Repair, shops and enginehouses | 27.317% |
| 253—Repair, power plants | 24.645% |
| 257—Repair, power transmission systems | 18.722% |
| 266(20)—Depreciation, shops and enginehouses | 27.317% |
| 266(29)—Depreciation, power plants | 24.646% |
| 266(31)—Depreciation, power transmissions system | 18.722% |
| 326—Work equipment repairs | 3.057% |
| 328—Miscellaneous equipment repairs | 6.551% |
| 507/540—Work equipment rent (net) | 3.056% |
| 402—Train supplies and expenses payroll taxes | 13.876% |
| Payroll taxes | 8.925% |
| Property taxes (property other than freight cars) | 1.410% |

* * * * * * *

| | |
|---|---|
| Ratio of ton-miles of nonrevenue freight in road service applicable to equipment repair | 0.11046 |
| Freight service portion of cost of handling nonrevenue freight used for equipment repair | 78.484% |
| Percent of freight service portion applicable to ownership cost of per diem freight train cars | 42.995% |
| Ratio of return plus Federal income taxes to return excluding Federal income taxes | 1.65505 |
| Ratio of revenue freight portion of total freight operating expenses to total freight operating expenses | 0.99600 |
| Ratio of switch engine hours switching bad order cars to total switching locomotive hours | 0.4408 |
| Percent of cost of switching bad order freight train cars applicable to ownership cost of per diem freight train cars | 85.950% |
| Return on depreciated investment in property other than freight train cars | 0.891% |
| Return on working capital | 10.075% |

For application to data of years other than 1960, the following changes are made in schedule 1:

In footnote 21, line 5, the source of the ratio is changed to footnote 22, line 8, column (3), and the ratio 1.65505 stricken.

Footnote 23, line 9, column (3) shall contin a source reference which reads "footnote 22, line 9, column (3)," and the ratio 6.620% contained in column (4) is stricken.

Schedule 1 is so designed as to permit the application of ratios and apportionments developed in the 1960 studies to the data of the year under analysis. Many of these ratios and apportionments required extensive reports on the part of all participating railroads and are of such nature as to have a relatively minor effect on the ultimate per diem charges. At the same time, the activities to which they refer are of such nature as to produce substantially similar effects over long periods in the absence of radical changes in railroad operations. We conclude that the ratios and apportionments developed in the 1960 studies, not revised specifically in this report, may appropriately be used for present and future per diem cost calculations but that the respondents may, should they deem it necessary, bring to our attention at any time the need for further studies. Certain ratios are developed from data available from annual reports and use of the Rail Form A formula. No reason appears why these cannot be conveniently recomputed annually without undue effort.

We find that the method of calculating ownership costs for repair and maintenance of per diem freight train cars set forth in schedule 1 of Rail Form H, 7—62, is just and reasonable, and subject to the foregoing qualification respecting future studies, is and will be productive of a fair assignment of such costs as necessary to just compensation of car owners.

The repair and maintenance costs as separated and analyzed in schedule 1 of Rail Form H for each year shall be summarized and separated between mileage and time portions as shown in table A, below. This statistical summary table contains certain additional items which, to the extent not already mentioned, shall be ascertained as set forth below. Where the necessary data are not available through current procedures, additional reports shall be made as prescribed. Appropriate revisions of standard reporting forms will be made as indicated.

(1) The total per diem car days for the study year shall be the average number of per diem freight train cars multiplied by the number of days in that year.

The average number of per diem freight train cars in service, both owned and leased from others, shall be the average of the number of per diem cars reported by class I line-haul railroads in railroad annual report form A, schedule 417, Inventory of Equipment, Freight Train Cars, in service of the respondent at the beginning and the end of the year. Schedule 417 shall be

revised for the reporting of freight train cars by types of car design, distinguished as to those cars that are per diem cars and non-per diem cars in service of the respondent at the beginning and the end of the year, and to include the definition of per diem cars given in item 7(C), below.

(2) The total per diem car days for the study year shall be separated between home per diem cars and foreign per diem cars on the basis of the percentage distribution between home and foreign of the sum of the home per diem cars on line (serviceable plus unserviceable) and the foreign per diem cars on line (serviceable plus unserviceable) using the average of the four quarters of the year as reported on Form OS-C for class I line-haul and switching and terminal companies.

(3) The total active home per diem freight train car days for the study year shall be determined by subtracting from the total home per diem freight train car days the car days in which home cars are inactive because unserviceable or because they are surplus and not needed for movement of freight.

(4) The total active foreign per diem freight car days for the study year shall be determined by subtracting from the total foreign per diem freight train car days the car days in which foreign cars are inactive because unserviceable or because they are surplus and not needed for movement of freight.

(5) The total constructive per diem payable days for the study year shall be determined by multiplying the sum of the total active home per diem freight train car days plus the total active foreign per diem freight train car days by the ratio which the total foreign per diem car days (serviceable plus unserviceable) bears to the total active foreign per diem freight train car days.

(6) Quarterly reports of Motive Power and Car Equipment, Form OS-C, filed by class I railroads, including switching and terminal railroad companies, shall be revised to provide for the reporting of serviceable and unserviceable home and foreign freight cars on line separated between per diem cars and non-per diem cars. Form OS-C shall be revised also to provide for reporting surplus per diem freight cars separated between home cars and foreign cars. The instructions to Form OS-C shall be revised to define unserviceable cars and surplus cars and per diem cars as follows:

(A) Unserviceable cars.

Unserviceable cars include cars out of service in connection with repair work. It includes cars being repaired in the shops of car builders, private car lines, and other noncarriers. (For the reporting railroads, it does not include cars which are being repaired in the shops of other railroads). It includes cars on repair tracks repaired and awaiting switching, cars on repair tracks undergoing or awaiting repairs, cars awaiting movement to repair tracks held on bad order storage tracks, cars awaiting movement to repair tracks held in train yard (excluding cars which are to be repaired in train yard without loss of time), cars moving empty in trains en route to shops, cars stored awaiting disposition (not including cars which have been retired from service and written out of ownership).

(B) Surplus per diem cars.

Surplus per diem cars are per diem cars which are in serviceable condition available for loading at the initial count on the last day of the quarter, but which have not been placed for loading within 48 hours. A record shall be made of all such cars on hand at 12:01 a.m. of the day following the last day of each quarter and a count of the same cars made 48 hours later to ascertain those still not placed for loading. The count of surplus cars shall include cars assembled in advance to meet loading requirements of more than 1 day, cars which have not been moved because of infrequent train service as on branch lines, cars set aside or stored for special or future loading such as perishables, grain, autos, rough freight, et cetera, cars stored because of seasonal decline in traffic, as coal cars, ore cars, et cetera. The count of surplus cars shall not include cars out of service in connection with repairs, cars actually moving en route to owners, cars moving on car service order cars in transit to loading points on holding road or to another road. The phrase "placed for loading" refers to: (1) physical switching of a car into position for loading (2) physical switching of a car into possession of a shipper who will subsequently move it to loading position; and (3) physical switching onto tracks at a freighthouse, pier, et cetera, for the purpose of being loaded.

(C) Per diem cars.

As used herein refers to freight cars other than cabooses owned or held under lease arrangement by U. S. class I line-haul railroads, whose interline rental is settled on a per diem basis under the code of per diem rules, or would be so settled if used by another railroad.

(7) Using ratios computed from information reported by class I line-haul and switching and terminal companies in Form OS-C, the average for the four quarters of the study year, the unserviceable per diem car days for the study year and surplus per diem car days for the study year shall be developed as follows:

(A) Unserviceable car days.

The ratio of home unserviceable cars on line to total home cars on line (serviceable plus unserviceable) shall be applied to the total home per diem car days computed in accordance with item 1 above to produce the unserviceable

car days of home cars for the study year. The ratio of foreign unserviceable per diem cars on line to total foreign per diem cars on line (serviceable plus unserviceable) shall be applied to the total foreign per diem car days on line developed in accordance with item 1 above to produce the total foreign per diem unserviceable car days for the study year.

(B) Surplus car days.

The ratio of home surplus per diem cars on line to home per diem cars on line (serviceable plus unserviceable) shall be applied to the total home per diem car days developed in accordance with item 1 above to produce the surplus car days of home per diem cars for the study year. The ratio of foreign surplus per diem cars on line to total foreign per diem cars on line (serviceable plus unserviceable), shall be applied to the total foreign per diem car days developed in accordance with item 1 above to produce the surplus car days of foreign per diem cars for the study year.

(8) Schedule 531, Statistics of Rail-line Operations, railroad annual report form A, shall be revised to require separate reporting of loaded and empty freight car miles of per diem cars in freight trains and passenger trains, and to include the definition of per diem cars given in item 7(C), above. Revisions herein prescribed to various reports shall take effect January 1, 1969.

Until current data is available to calculate the car-mile divisor, it shall be determined in the manner set forth in schedule 3, sheet 1, line 3, column 3, of Rail Form H. This requires the deduction from the annual report car-miles of all cars on class I railroads for the year under consideration of the estimated car-miles of non-per diem cars. The latter figure is estimated by applying to the annual car-miles of non-per diem cars on class I line-haul railroads in 1960, the ratio of car-miles of mileage cars in the year under consideration to the car-miles of mileage cars for the year 1960.

Until current data is available from the reports mentioned above, the car-day divisor shall be determined by the procedure set forth in Rail Form H, schedule 2. The active per diem car days for the year under consideration developed at line 11, part B, thereof, shall be multiplied by the 1960 ratio of per diem days paid for to active foreign per diem car days and the product divided by the average number of per diem freight train cars in service in the year under consideration, developed at line 5, part A.

TABLE A

*Statistical and repair summary*

| Line No. | Item (1) | Source (2) | (3) | Total (3) | Mileage portion 50 percent of column (3) (4) | Time portion 50 percent of column (3) (5) |
|---|---|---|---|---|---|---|
| 1 | Freight-train car repairs[1] | Rail Form H, schedule 1, sheet 4, line 65, column (5) | | | | |
| 2 | Depreciation of freight-train car repair facilities | Rail Form H, schedule 1, sheet 3, line 57, column (5) | | | | |
| 3 | Property taxes on car repair facilities | Rail Form H, schedule 1, sheet 3, line 52, column (5) | | | | |
| 4 | Payroll taxes | Rail Form H, schedule 1, sheet 3, line 50, column (5) | | | | |
| 5 | Return on investment in freight-train car repair facilities | Rail Form H, schedule 1, sheet 4, line 62, column (5) | | | | |
| 6 | Return on working capital | Rail Form H, schedule 1, sheet 4, line 63, column (5) | | | | |
| 7 | Total ownership repair cost to be apportioned between miles and time | Lines 1 to 6 inclusive | | | | |

| Line No. | Item (1) | Source (2) | (3) | Total (3) | Home cars (4) | Foreign cars (5) |
|---|---|---|---|---|---|---|
| 8 | Total per diem freight-train cars in service, owned and leased from others December 31, 19__ (year preceding study year) | 19__ Annual Report Form A, schedule 417 | | | XXX | XXX |
| 9 | Total per diem freight-train cars in service, owned and leased from others December 31, 19__ (study year) | 19__ Annual Report Form A, schedule 417 | | | XXX | XXX |
| 10 | Average number of per diem freight-train cars in service, owned and leased from others (study year 19__) | Line 8 plus line 9 divided by 2.0 | | | XXX | XXX |
| 11 | Total per diem car days, study year 19__ | Line 10 x 365[2] | | | XXX | XXX |
| 12 | Serviceable per diem cars on line end of the quarters study year 19__ | Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__ | | | | |
| 13 | Unserviceable per diem cars on line end of the quarters study year 19__ | Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__ | | | | |
| 14 | Surplus per diem cars on line end of the quarters study year 19__ | Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__ | | | | |
| 15 | Total per diem cars on line end of the quarters study year 19__ | Line 12 plus line 13 | | | | |

See footnotes at end of table

*Statistical and repair summary*—Continued

| Line No. | Item (1) | Source (2) | Total (3) | Home cars (4) | Foreign cars (5) |
|---|---|---|---|---|---|
| 16 | Percentage distribution of per diem cars on line between home and foreign | Line 15 | 100.000% | % | % |
| 17 | Ratio of unserviceable per diem cars on line to total per diem cars on line | Line 13 divided by line 15 | xxx | | |
| 18 | Ratio of surplus per diem on line to total per diem cars on line | Line 14 divided by line 15 | xxx | | |
| 19 | Total per diem car days study year 19__ separated between home and foreign | Line 11, column (3) x line 16 | | | |
| 20 | Unserviceable per diem car days study year 19__ | Line 17, x line 19 | * | | |
| 21 | Surplus per diem car days study year 19__ | Line 18 x line 19 | * | | |
| 22 | Active per diem car days study year 19__ | Line 19 minus lines 20 and 21 | | | |
| 23 | Ratio total foreign per diem car days to total active foreign per diem car days | Line 19, column (5) divided by line 22, column (5) | xxx | xxx | |
| 24 | Total constructive per diem payable days study year 19__ | Line 22, column (3) x line 23, column (5) | | xxx | xxx |
| 25 | Total line-haul car-miles of per diem cars in the United States (loaded plus empty) | Annual report schedule 531 | | xxx | xxx |
| 26 | Constructive per diem payable days per car | Line 24, column (3) divided by line 10, column (3) | | xxx | xxx |
| 27 | Line-haul car-miles per car | Line 25, column (3) divided by line 10, column (3) | | xxx | xxx |
| 28 | Average repair cost per car | Line 7, column (4)(5) divided by line 10, column (3) | | [3] | [3] |

[1]Including allocation of inspection costs, nonrevenue freight, overheads, maintenance of shops, power plants, work equipment, miscellaneous equipment, and switching bad order cars.

[2]In leap years use 366.

*Cross add for total.

[3]Mileage and time portions of repair cost—50 percent each.

The rates hereinafter prescribed are based upon rail Form H calculations for the years 1963, 1964, and 1965, and the principles mentioned herein. Pending the availability of car-day and car-mile divisors developed currently as described above, these figures must be developed by use of Rail Form H and the ratios developed in the 1960 special studies. Shown below is a summary of the pertinent data.

TABLE A

*Composite of statistical and repair summary*

| Item | 1963 | 1964 | 1965 |
|---|---|---|---|
| Freight train car repairs | $550,322,495 | $564,752,370 | $562,290,338 |
| Depreciation facilities | 8,071,570 | 8,088,396 | 8,143,383 |
| Property taxes—facilities | 3,385,171 | 3,257,518 | 3,323,316 |
| Payroll taxes | 27,145,511 | 28,162,325 | 29,179,129 |
| Return on investment—repair facilities | 11,645,943 | 10,557,090 | 10,750,505 |
| Return on working capital | 2,665,587 | 2,750,841 | 2,946,229 |
| Total | 603,236,276 | 617,568,540 | 616,632,900 |
| Mileage portion | 301,618,138 | 308,784,270 | 308,316,450 |
| Time portion | 301,618,138 | 308,784,270 | 308,316,450 |
| Average number cars in service | 1,494,348 | 1,460,000 | 1,438,345 |
| Active per diem car days | 475,265,360 | 431,613,831 | 477,952,280 |
| Per diem payable days | 505,031,229 | 458,645,805 | 507,886,431 |
| Total line-haul car-miles | 21,290,196,857 | 22,217,341,219 | 22,981,573,444 |
| Per diem payable days per car | 337 | 346 | 352 |
| Line haul car-miles per car | 14,249 | 15,218 | 15,979 |
| Average repair cost per car (50 percent) | 201.83 | 211.49 | 213.66 |

| | Per diem payable days per car | Line-haul car miles per car | 50-percent average repair cost per car |
|---|---|---|---|
| 3-year average | 345 | 15,149 | $209.00 |
| Property tax ratio-1965 | 0.01018 | | |

TABLE B

*Summary of investment costs–per $1,000 original cost*

| Years in service | Annual charge to depreciation per $1,000 cost[1] | Composite interest on balance[2] | Reimbursement of property taxes[3] | Total columns 2, 3, 4 |
|---|---|---|---|---|
| Group A | | | | |
| 0–5 | $30.00 | $55.50 | $9.42 | $94.92 |
| Group B | | | | |
| 6–10 | 30.00 | 46.50 | 7.90 | 84.40 |
| Group C | | | | |
| 11–15 | 30.00 | 37.50 | 6.38 | 73.88 |
| Group D | | | | |
| 16–20 | 30.00 | 28.50 | 4.87 | 63.37 |
| Group E | | | | |
| 21–25 | 30.00 | 19.50 | 3.35 | 52.85 |
| Group F | | | | |
| 26–30 | 30.00 | 10.50 | 1.85 | 42.35 |
| Group G | | | | |
| over 30 | xxx | 6.00 | 1.02 | 7.02 |

[1]At 3 percent per annum.

[2]At 6.0 percent per annum before taxes on midyear value of middle year of period based on original cost reduced 3 percent per annum.

[3]Taken at 1965 figure of 0.01018 multiplied by midyear value of car for middle year of period based on original cost reduced 3 percent per annum.

We find that the rates set forth in table C, below, are based on conservative estimates of cost, are just and reasonable and will provide just and reasonable compensation to car owners for the future, and that such rates shall be assessed and paid by all respondent carriers, subject to the act from and after the effective date of our order herein.

## RATE TABLE C

| Line No. | Cost Bracket (1) | Mileage charges: Annual reduction in car value[1] (2) | Mileage charges: Annual repair and maintenance[2] (3) | Mileage charges: Total mileage cost[3] (4) | Mileage charges: Charge per line-haul mile[4] (5) | Time charges: Group A 0—5 years: Annual[5] (6) | Time charges: Group A 0—5 years: Daily[6] (7) | Time charges: Group B 6—10 years: Annual[5] (8) | Time charges: Group B 6—10 years: Daily[6] (9) |
|---|---|---|---|---|---|---|---|---|---|
| 1 | $0-1,000 | $12 | $209.00 | $221.00 | 1.47¢ | 291.92 | $0.85 | 281.40 | 0.82 |
| 2 | 1-3,000 | 24 | 209.00 | 236.00 | 1.57¢ | 374.84 | 1.09 | 353.80 | 1.03 |
| 3 | 3-5,000 | 48 | 209.00 | 257.00 | 1.71¢ | 540.68 | 1.57 | 498.60 | 1.45 |
| 4 | 5-7,000 | 72 | 209.00 | 281.00 | 1.87¢ | 706.52 | 2.05 | 643.40 | 1.86 |
| 5 | 7-9,000 | 96 | 209.00 | 305.00 | 2.03¢ | 872.36 | 2.53 | 788.20 | 2.28 |
| 6 | 9-11,000 | 120 | 209.00 | 329.00 | 2.19¢ | 1,038.20 | 3.01 | 933.00 | 2.70 |
| 7 | 11-13,000 | 144 | 209.00 | 353.00 | 2.35¢ | 1,204.04 | 3.49 | 1,077.80 | 3.12 |
| 8 | 13-15,000 | 168 | 209.00 | 377.00 | 2.51¢ | 1,369.88 | 3.97 | 1,222.60 | 3.54 |
| 9 | 15-17,000 | 192 | 209.00 | 401.00 | 2.67¢ | 1,535.72 | 4.45 | 1,367.40 | 3.96 |
| 10 | 17-19,000 | 216 | 209.00 | 425.00 | 2.83¢ | 1,701.56 | 4.93 | 1,512.20 | 4.38 |
| 11 | 19-21,000 | 240 | 209.00 | 449.00 | 2.99¢ | 1,867.40 | 5.41 | 1,657.00 | 4.80 |
| 12 | 21-23,000 | 264 | 209.00 | 473.00 | 3.15¢ | 2,033.24 | 5.89 | 1,801.80 | 5.22 |
| 13 | 23-25,000 | 288 | 209.00 | 497.00 | 3.31¢ | 2,199.04 | 6.37 | 1,946.60 | 5.64 |
| 14 | 25-27,000 | 312 | 209.00 | 521.00 | 3.47¢ | 2,364.92 | 6.85 | 2,091.40 | 6.06 |
| 15 | 27-29,000 | 336 | 209.00 | 545.00 | 3.63¢ | 2,530.76 | 7.34 | 2,236.20 | 6.48 |
| 16 | 29-31,000 | 360 | 209.00 | 569.00 | 3.80¢ | 2,696.60 | 7.82 | 2,381.00 | 6.90 |
| 17 | 31-33,000 | 384 | 209.00 | 593.00 | 3.95¢ | 2,862.44 | 8.30 | 2,525.80 | 7.32 |
| 18 | 33-35,000 | 408 | 209.00 | 617.00 | 4.11¢ | 3,028.28 | 8.78 | 2,670.60 | 7.74 |
| 19 | 35-37,000 | 432 | 209.00 | 641.00 | 4.27¢ | 3,194.12 | 9.26 | 2,815.40 | 8.16 |
| 20 | 37-39,000 | 456 | 209.00 | 665.00 | 4.43¢ | 3,359.96 | 9.74 | 2,960.20 | 8.58 |
| 21 | 39-41,000 | 480 | 209.00 | 689.00 | 4.60¢ | 3,525.80 | 10.22 | 3,105.00 | 9.00 |

See footnotes at end of table

Time charges—*Continued*

| Line No. | Cost bracket | Group C 11-15 years | | Group D 16—20 years | | Group E 21—25 years | | Group F 26—30 years | | Group G over 30 years | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Annual[5] (10) | Daily[6] (11) | Annual[5] (12) | Daily[6] (13) | Annual[5] (14) | Daily[6] (15) | Annual[5] (16) | Daily[6] (17) | Annual[5] (18) | Daily[6] (19) |
| 1 | $0-1,000 | 270.88 | 0.79 | 260.37 | 0.75 | 249.85 | 0.72 | 239.35 | 0.69 | 216.02 | 0.63 |
| 2 | 1-3,000 | 332.76 | 0.96 | 311.74 | 0.90 | 290.70 | 0.84 | 269.70 | 0.78 | 223.04 | 0.65 |
| 3 | 3-5,000 | 456.52 | 1.32 | 414.48 | 1.20 | 372.40 | 1.08 | 330.40 | 0.96 | 237.08 | 0.69 |
| 4 | 5-7,000 | 580.28 | 1.68 | 517.22 | 1.50 | 454.10 | 1.32 | 391.10 | 1.13 | 251.12 | 0.73 |
| 5 | 7-9,000 | 704.04 | 2.04 | 619.96 | 1.80 | 535.80 | 1.55 | 451.80 | 1.31 | 265.16 | 0.77 |
| 6 | 9-11,000 | 827.80 | 2.40 | 722.70 | 2.09 | 617.50 | 1.79 | 512.50 | 1.49 | 279.20 | 0.81 |
| 7 | 11-13,000 | 951.56 | 2.76 | 825.44 | 2.39 | 699.20 | 2.03 | 573.20 | 1.66 | 293.24 | 0.85 |
| 8 | 13-15,000 | 1,075.32 | 3.12 | 928.18 | 2.69 | 780.90 | 2.26 | 633.90 | 1.84 | 307.28 | 0.89 |
| 9 | 15-17,000 | 1,199.08 | 3.48 | 1,030.92 | 2.99 | 862.60 | 2.50 | 694.60 | 2.01 | 321.32 | 0.93 |
| 10 | 17-19,000 | 1,322.84 | 3.83 | 1,133.66 | 3.29 | 944.30 | 2.74 | 755.30 | 2.19 | 335.36 | 0.97 |
| 11 | 19-21,000 | 1,446.60 | 4.19 | 1,236.40 | 3.58 | 1,026.00 | 2.97 | 816.00 | 2.37 | 349.40 | 1.01 |
| 12 | 21-23,000 | 1,570.36 | 4.55 | 1,339.14 | 3.88 | 1,107.70 | 3.21 | 876.70 | 2.54 | 363.44 | 1.05 |
| 13 | 23-25,000 | 1,694.12 | 4.91 | 1,441.88 | 4.18 | 1,189.40 | 3.45 | 937.40 | 2.72 | 377.48 | 1.09 |
| 14 | 25-27,000 | 1,817.88 | 5.27 | 1,544.62 | 4.48 | 1,271.10 | 3.68 | 998.10 | 2.89 | 391.52 | 1.13 |
| 15 | 27-29,000 | 1,941.64 | 5.63 | 1,647.36 | 4.77 | 1,352.80 | 3.92 | 1,058.80 | 3.07 | 405.56 | 1.17 |
| 16 | 29-31,000 | 2,065.40 | 5.99 | 1,750.10 | 5.07 | 1,434.50 | 4.16 | 1,119.50 | 3.24 | 419.60 | 1.22 |
| 17 | 31-33,000 | 2,189.16 | 6.35 | 1,852.84 | 5.37 | 1,516.20 | 4.39 | 1,180.20 | 3.42 | 433.64 | 1.26 |
| 18 | 33-35,000 | 2,312.92 | 6.70 | 1,955.58 | 5.67 | 1,597.90 | 4.63 | 1,240.90 | 3.60 | 447.68 | 1.30 |
| 19 | 35-37,000 | 2,436.68 | 7.06 | 2,058.32 | 5.97 | 1,679.60 | 4.87 | 1,301.60 | 3.77 | 461.72 | 1.34 |
| 20 | 37-39,000 | 2,560.44 | 7.42 | 2,161.06 | 6.26 | 1,761.30 | 5.11 | 1,362.30 | 3.95 | 475.76 | 1.38 |
| 21 | 39-41,000 | 2,684.20 | 7.78 | 2,263.80 | 6.56 | 1,843.00 | 5.34 | 1,423.00 | 4.12 | 489.80 | 1.42 |

[1]Forty percent of annual reduction in value (depreciation).

[2]Statistical summary—line 28, column 4.— 3-year average—see table A.

[3]Column 2 + column 3.

[4]Column 4 divided by car-mile divisor—statistical summary, line 27, column 3.—3-year average (15,000) see table A.

[5]Tax and investment costs for group and cost bracket (table B, column 5) less column 2 plus time portion of 3-year average repair and maintenance cost (statistical summary, line 28, column 5)—see table A.

[6]Annual time cost divided by car day divisor (statistical summary, line 26, column 3)—3-year average (345[d]) see table A.

DOCKET NO. 31358

In docket No. 31358, the complainants seek a finding by the Commission that the AAR per diem rates charged since March 1951 were just, reasonable, and otherwise lawful, and that payments at lesser rates have been, are, and would be unjust, unreasonable, and noncompensatory, in violation of section 1 of the Interstate Commerce Act. As a result of subsequent amendments to the complaint in this case, it now embraces all past rates, including the multilevel rates. The circumstances involved in this dispute were fully described in the prior report of the Commission, *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co., supra.* In that report, decided October 17, 1955, it was found that the rates charged up to that time were not in excess of reasonable compensation during the periods in which they were effective, and that the then existing rate of $2.40 was not in excess of reasonable compensation for present use. Upon appeal by the defendants, a three-judge United States District Court set aside the order of the Commission discontinuing the proceeding and remanded it for further consideration. *Boston & Maine Railroad* v. *United States, supra.* An appeal to the United States Supreme Court was dismissed. *Boston & Maine Railroad* v. *United States, supra.*

As heretofore described, a number of the complainants commenced civil actions before the United States District Court for the Southern District of New York, seeking judgments for damages against the defendants for the balance of per diem payments alleged to be due and unpaid. The court in those cases found generally for the complainants, but deferred decision as to the amount of damages pending the final determination of the issues in docket No. 31358. Pursuant to the order of the court, certain of the parties to the civil suits sought and obtained permission to intervene in docket No. 31358, and appropriate amendments to the complaint in that proceeding were made, requesting the Commission, without regard to the proceeding pending in docket No. 33145, to advise the court what per diem rate was just, fair, reasonable and nondiscriminatory for each month beginning with August 1953, to the date of the order of the court, i.e., June 15, 1962. A certified copy of the order was required to be filed with the Commission, which specifically requested its cooperation and advice as described above. *Baltimore & O. R. Co.* v. *New York, N. H. & H. R. Co., supra.* Similar advices are desired by the Supreme Court of the

State of New York, County of New York, in connection with the disposition of suits brought by the Boston & Maine and New Haven Railroad against the Illinois Central Railroad to recover interline freight balances, in which the defendant counterclaimed for balances under per diem claims.

In giving further consideration to the issues in docket No. 31358, certain questions raised on remand require attention. In 1951, the AAR subcommittee on mileage and per diem recommended that account No. 314, the major repair account, be subdivided to record separately the repair costs for home cars, foreign cars, railroad and privately owned mileage cars, and cabooses; that classified repairs, running repairs, switching expenses and credits for sales of scrap be shown separately; and that car repairs for cabooses be eliminated from account No. 314 and caboose-car days eliminated from the freight-car day divisor. In remanding the case, the court expressed the view that the Commission should not have rejected the recommendation without a more thorough investigation and analysis.

Concededly, the multitudinous cost items entered in account No. 314 over the years, without separation as to the sundry elements mentioned by the committee, are not now susceptible of separation. Sample studies conducted by the Section of Cost Finding in 1960 dealt with several separations, however, and the analysis based thereon took into consideration such of these factors as were considered significant. The recorded totals of the past accounts can be separated, therefore, by use of the ratios derived from the 1960 studies.. The findings which follow include this procedure.

The court also expressed doubt as to the validity of car-day divisors which were based upon average utilizations for the past 20 years, the period having been chosen with reference to the average age of cars then in service. There can be little dispute that where the object of the computation is to ascertain the cost per active car day for any given period, not only must the costs incurred in that period be employed, but also the active car days for that same period. Since our consideration in docket No. 31358 is of past years, we have no need to attempt an approximation of utilization to be anticipated in the future and may employ, to the extent permitted by available statistics, the car days for the years in issue.

Remand of docket No. 31358 by the United States District Court was due to the conclusion of the court that consideration should have been given to car mileage and the fair distribution of per diem

costs among car users. We have found that the substantial difference in use of cars measured by line-haul mileage requires that it be reflected in the distribution of per diem costs in the future. No records are available, however, with which to determine the actual mileages of foreign per diem cars during the past periods when the challenged rates were in effect.

A method of estimating an appropriate rate for past years which took into account a charge based on mileage was suggested by the Section of Cost Finding and a generally similar method was used by the examiner to calculate rates which he found reasonable for past years. Both methods require certain assumptions which are not sufficiently supported by the record. After assigning the total annual costs for the year 1960 between time and mileage, each estimates the per-mile and per-day cost. For each carrier the per-mile cost is multiplied by its 1960 line-haul mileage of foreign cars and divided by its per diem days paid for to produce a daily figure which, when added to an individually adjusted per-day cost, constitutes the rate estimated as proper to be paid by that carrier. Necessarily, a different rate is produced for each carrier.

To estimate a similar rate for each carrier for years other than 1960, the examiner determined the ratio which the 1960 rate bore to the 1960 average rate calculated on a time-only basis, and applied this to the average, time-only rates which he found to be reasonable for each of the past periods during which the AAR rates were in effect. The Section of Cost Finding method employed the ratio which the individual carriers' time-mile rate in 1960 bore to the overall time-mile rate of all carriers in that year, applying it to a separately estimated overall time-mile rate for the year under consideration. There is some evidence that the ratio of per diem days paid for by individual railroads in 1960 to the total of all carriers is substantially similar to the ratio in other years in issue, but a similar relationship has not been proven with respect to the mileage of foreign cars on individual lines. While many of the ratios developed in the 1960 studies, particularly those in schedule 1 of Rail Form H underlying the estimation of ownership repair costs, would not change appreciably from year to year, this is not true with respect to the ratios necessarily employed in estimating these time-mileage rates for individual carriers. It cannot be found that 1960 was so nearly representative of conditions prevailing throughout all the other years in issue with respect to car mileage on a carrier-by-

carrier basis as to justify reliance on these ratios in making determinations upon which monetary judgments depend.

We find that no practicable and probative method has been demonstrated on this record by which a reliable estimate might be made as to the distribution of costs between time and mileage for individual defendants in past years, or for all railroads for years other than 1960. The reasonableness of rates assessed in past years must be measured by their application on a daily basis.

As a result of the complaint filed on September 21, 1953, the decision by the commission in the title proceeding on October 19, 1955, and our decision in *Alabama T. & N. R. Co. v. Aberdeen & R. R. Co., supra*, the use of reproduction cost as the base for calculation of charges to depreciation and interest was approved. In neither of those cases did the record contain the extensive special studies and data now available for our consideration. In 1949 and in 1955, the daily rate based upon the average depreciation and interest cost of all cars was clearly insufficient to cover the particular costs of many of the new cars then being built. The greater desirability of the new cars apparently resulted in greater use being made of them by foreign lines, either pursuant to or in violation of car service rules. As to these particular cars, owners did not receive just and reasonable compensation under rates fixed by the average costs of all cars. At the same time, to the extent that the older cars were used, the amounts received by owners exceeded the necessary compensation.

Calculation of rates using reproduction cost as a base represented an attempt to compensate for this situation. The extent to which the respondents actually suffered a net deficiency in compensation as a result of undercompensation on new cars not by overcompensation on old cars has not been established.[26] Where a single average daily rate is employed, it cannot be judged with reference to the cost of particular cars. It must be measured with reference to the total costs of all cars. The increase in the per diem rates due to use of reproduction cost resulted in only a few of the new cars receiving per diem payments which met their particular costs. Thus, of the 974,386 cars sampled in 1961, there were 643,123, or about two-thirds, which had depreciated original cost of less than $3,000; 331,263

[26] On December 31, 1961, a sampling of 974,386 per diem cars out of a total of about 1,600,000 cars indicated that about two-thirds had depreciated original costs lower than the fleet average and would have received excess compensation at the average rate.

had depreciated original costs over $3,000. With rates based upon original cost, about one-third of the per diem fleet would consist of cars which would not receive payments equivalent to their costs. Two-thirds would receive payments in excess of their costs. Use of reproduction cost increased the average depreciated cost to $4,200 which still left over 20 percent of the fleet undercompensated. At the same time, the latter method increased the depreciation and interest charged to the fleet as a whole by approximately $330,500,000, equivalent to over 60 cents per day on each car.

Consideration has already been given to the use of reproduction cost as a base for calculation of per diem rates and to the extent to which fairness to owners requires recognition of decreases in the purchasing power of the dollar. As heretofore pointed out, the use of a charge to depreciation based upon reproduction cost of the car provides a measure of the owner's capital cost burden *only* if it has paid the full purchase price itself. In fact, a substantial portion of the cost of cars is customarily obtained from lenders, and repaid over subsequent years in dollars of current purchasing power. It is proper to allow for inflation with respect to that portion of the average original cost of the cars representing the actual investment of the owner. For reasons heretofore mentioned, it is found that such allowance applied to 40 percent of the annual depreciation charge on the average original cost makes adequate provision for compensation to owners for this element of the ownership burden. No persuasive reason is shown why the invested amount upon which interest is calculated should be inflated by a cost index representing the approximate current cost of building the car. Comments with respect to this point made earlier in this report are equally applicable to the calculation for rates in prior years.

Upon further consideration we find that the use of average reproduction cost of all cars has not been shown to be just and reasonable or productive of just and reasonable compensation to car owners. We are persuaded, however, that under a single average rate, car owners do incur some loss of just compensation due to greater than average use being made of newer cars, and in the rates hereinafter found to be just and reasonable we have included provision therefor.

None of the AAR calculations is based upon data for the years in which the rate actually was applied. Thus the $2.40 rate which was in effect from August 1, 1953 to January 1, 1957, was

based upon statistics for the calendar year 1952. These indicated a cost for repairs and associated maintenance items of 121.05 cents per active car day; taxes of 14.334 cents; return on depreciated investment in freight cars and repair facilities, based on an average of original and reproduction costs, of 47.128 cents; and allowance for depreciation, based upon reproduction cost, of 56.222 cents. The allowances for depreciation and interest on cars and facilities increased these figures approximately $200 million over original cost figures. About 1 1/3 cents per day were added to allow for 1953 increased wage and material costs.

The $2.75 rate, which was in effect from January 1, 1957, to December 1, 1959, was supported by AAR staff calculations using cost statistics for the 12 months ending June 30, 1956. These indicated a cost for repairs and associated maintenance items of 114.28 cents per active car day; taxes of 18.137 cents; return on depreciated investment in freight cars and repair facilities, based upon reproduction costs, of 72.06 cents; allowance for depreciation of freight cars, based upon reproduction costs, of 61.48 cents; and allowance for depreciation of repair facilities, based on original cost, of 1.58 cents. The mid-1955 to mid-1956 cost as thus computed, 267.54 cents per active car day, was increased by 9.41 cents to allow for labor, material and tax increases, resulting in a total of 276.96 cents, which was rounded to the $2.75 rate.

The reproduction value of cars used by the AAR to calculate the allowance for depreciation was based on reproduction costs as of December 31, 1955, using, however, the higher inventory of cars as of December 31, 1954, since that was the latest then available. The amount was also increased by 8.5 percent to reflect estimated cost increases between 1955 and the date of the AAR calculations. Cars owned or leased, including cabooses, at the end of 1954 were 1,757,731, compared to 1,719,951 at the end of 1955. The cost index increased from 450 in 1954 to 468 in 1955. Use of the higher costs as well as the higher number of cars produced an overstatement of the allowance for depreciation.

The $2.88 rate, which was in effect from December 1, 1959, to January 1, 1964, was supported by AAR staff calculations using cost statistics, other than for repairs, for the calendar year 1958. A 5-year adjusted average cost of repairs was employed, which, together with associated maintenance items, amounted to 105.35 cents per active car day. Allowance for taxes was 18.076 cents; return on depreciated investment in

freight cars and repair facilities, based on reproduction costs, was 85.737. cents; allowance for depreciation of freight cars based on reproduction cost was 73.276 cents; and allowance for depreciation of repair facilities, based on original cost, was 1.451 cents. The total cost, as thus computed, 283.893 cents per active car day was adjusted to reflect 1959 cost increases, resulting in a figure of 287.94 cents which was rounded to the $2.88 rate.

The rates for the several brackets under the new multilevel system which became effective January 1, 1964, are supported by an AAR study using 1961 costs which separated the ownership burden into two charges, one for depreciation and interest on car value, and one covering total operating costs including taxes. After classifying cars into value brackets according to their depreciated original cost, the amount to be allowed cars in each bracket for depreciation was calculated by allowing 3 percent on the average undepreciated reproduction value of that group of cars. The amount allowed as interest was calculated by taking 6 percent of the average depreciated reproduction value of all cars in the group. All other costs were taken as the same for every car, and were calculated at $406 per car. In calculating the cost of taxes, and the repair and associated maintenance costs, which produced the figure of $406, the AAR employed the same procedures used in computing these items in prior years. Ratios and apportionments used were those developed by the 1956 questionnaire, heretofore mentioned. Account No. 314 repair costs to be anticipated were estimated by using the average of such costs for the 5-year period, 1957-1961, and a car utilization factor of 91.87, or 335.33 days, was assumed, based upon the average of the 20-year period, 1942 through 1961.

Both the Section of Cost Finding calculations and those made by the AAR in support of the rates prior to 1964 purport to calculate the ownership cost of freight cars at an average figure spread over all per diem cars for days of active use. Substantial variations occur, however, due to differences in the apportionments, methods used, and the basic data employed. To calculate the base for depreciation, the AAR multiplied the number of cars in per diem use, both owned and leased, by the average undepreciated reproduction cost, the latter figure having been obtained from the Commission's Bureau of Accounts, Section of Valuation and Depreciation. A rate of slightly over 3 percent was then applied to the total valuation to calculate the charge. The Section

of Cost Finding calculations employ the Annual Report data for charges to depreciation plus an allowance for assumed depreciation on fully depreciated cars. These are based upon original costs. In place of using a depreciation charge for cars leased from nonrailroad owners, the Section of Cost Finding method includes the payments made to such owners as shown in the annual reports, with minor adjustments. Where a single average rate is being calculated for all cars, the method used by the Section of Cost Finding appears the more accurate.

Prior to the calculations underlying the $2.88 rate, account No. 314 repair costs had been estimated by the AAR using the costs of the latest available year. Beginning with that rate, and again in calculations underlying the multilevel rates, the average of account No. 314 costs for the last 5 years, adjusted to current levels, was employed. The record demonstrates that account No. 314 is subject to annual fluctuation of as much as 20 percent. The 1954-58 adjusted account No. 314 average as computed by the AAR and employed in calculations underlying the $2.88 rate which became effective December 1, 1959, was $590,045,295. The actual amount subsequently developed by the AAR for 1959 was $516,023,831, and for 1960, the first full year in which the rate applied, the actual amount was $488,898,352. In 1961 the figure dropped to $438,620,793.

The AAR estimated the deadhead haul cost of repair material, referred to by the Section of Cost Finding as nonrevenue freight, by taking 6.06 percent of the total of the material proportion of the freight car repair proportion of general expense, maintenance of shop and equipment accounts, and the material portion assigned from account No. 314. The percentage was based upon a study made in connection with *Rules for Car-Hire Settlement, supra,* while apportionment of the various accounts was based on studies made in 1956.[27] The Section of Cost Finding analyzed the 1960 Annual Report accounts to isolate expenses applicable to nonrevenue freight. From the special studies, ratios were developed to estimate the ton-miles of nonrevenue freight applicable to equipment repairs, and the consequent cost. Further analysis of repair accounts in the Annual Reports developed the separation of this amount between ownership costs of per diem cars, and other costs.

[27] The case cited was decided January 7, 1930 and the study was between 20 and 30 years old during the period it was used by the AAR for the calculation of rates here in issue.

Adjustments used by the AAR to account No. 314 were based upon the returns to a questionnaire of August 14, 1956, covering operations for the 12 months ending June 30, 1956. One of these adjustments involved a reduction of from 64 to 66 percent of the total labor cost of train yard and interchange inspection, to eliminate costs resulting from inspection of private cars, foreign per diem cars, and that related to transportation activities. A further deduction of 1.46 percent of the total of account No. 314 was made to reflect payments for foreign cars destroyed, less salvage. Labor and material charges for user responsibility repairs to foreign cars were deducted by use of an amount calculated at 2.73 percent of the total account No. 314.

The Section of Cost Finding analysis included as ownership costs the inspection costs of foreign cars, and deducted the cost of repairs to home cars which were user responsibility. In the calculations underlying the $2.40 rate the AAR employed 40 percent of inspection costs as the portion applicable to private cars, user costs and transportation activities. This was based upon the results of the 1947 studies. The Section of Cost Finding studies in 1960 indicated that 45 percent should be so assigned.

Deductions made by the AAR from account No. 314 included 2.73 percent of the total, based upon the 1956 studies, representing the labor and material charges and voucher payments for repairs to foreign cars made necessary by unfair usage by the handling line. This deduction does not include any amount for handling line responsibility repairs by car owners, made on their own cars when acting as user thereof. Thus, while the per diem rate eliminated the cost of repairs due to unfair usage by users of foreign cars, it did not eliminate the cost of repairs due to unfair usage by the owner when using its own car. The cost of unfair usage repairs should be borne by the using line directly, whether the car is home or foreign. The 1960 studies indicated that 2.788 percent of account No. 314 total repair costs arose from this source.

While the Section of Cost Finding analysis covers about 2 1/2 percent less cars than those included by the AAR, generally the total amounts for repairs and associated items are higher. A major cause of the difference is in the allowance for switching of bad order cars. The AAR added to account No. 314 an amount equal to 1.24 percent thereof, based upon its 1956 study, to approximate the additional charges for this item which were recorded in other accounts. The Section of Cost Finding analysis for 1960

added the equivalent of 14.7 percent of account No. 314 for this item. The remainder of the excess of these calculations arises from larger allowances for items of general expenses, transportation expenses, maintenance of way expenses, and overheads on the latter two. The content and method of evaluation of the questionnaires relied upon by the AAR are not of record. In view of the continuing changes in composition of the per diem fleet, traffic movement and volume, operating practices, et cetera, it must be found that the results produced by the 1960 studies are the most reliable and take precedence over inconsistent estimates developed through use of the older studies.

To develop car-day divisors, the AAR totaled the freight cars owned or leased at the end of each year for the preceding 20 years, and subtracted therefrom the total average number of home bad order and surplus cars for the same years. The ratio of the resulting figure to the total number of cars was then multiplied by 365 to determine the active car days per car. The figures included cabooses and other cars not used in per diem service but, to an indeterminate extent, any inaccuracy resulting therefrom was offset by the inclusion of the costs attributable to the additional cars.

The deduction as computed by the AAR for home cars out of service due to repairs exceeds that indicated by the special studies. Members of the AAR report on form CS-60 the home per diem cars out of service for this cause. A test in September 1956, indicated that these reports were understated by 23.4 percent. In subsequent per diem cost calculations the reported totals were increased by this percentage. For the year 1960, the reported number of 132,597, thus increased, and multiplied by 366 days, produces 59,886,640 bad order car days. The special studies indicated 54,198,734, a difference of about 10 percent.

The deduction for surplus cars used by the AAR appears greatly underestimated. Members of the AAR regularly report to that organization, on form CS-44, the number of surplus cars on hand, both home and foreign. A 1-week test in February 1949, indicated that approximately 1.6 percent were foreign cars and thereafter the amount to be deducted for surplus cars was reduced by this percentage. As reported, the daily average figure for home and foreign surplus cars for 1960 was 36,672. Reduced by the factor above mentioned to eliminate foreign cars, and multiplied by 366 days, produces a figure of 13,421,952 surplus car days, less than 20 percent of the number indicated by the Section of Cost Finding studies.

The Section of Cost Finding studies were based upon actual counts of cars on hand and not placed for loading at the beginning and end of a 48-hour period. The reports on CS-44 are based upon the judgment of each carrier's personnel. The latter require that each carrier estimate, at the end of each day, the empty cars on hand at loading stations in excess of the number needed for the next day's loading. It is a figure which the AAR witness conceded was not very accurate, and was generally understated, particularly in periods of car shortage.

The validity of the AAR cost calculations, and the questionnaire data employed, were challenged on a number of grounds. In his report the examiner made a number of revisions of the AAR calculations to conform to the principles which he found applicable. On exceptions, the revisions to the AAR calculations are challenged in several respects while other parties criticize the absence of revisions which they espouse. Upon consideration of the entire record, we conclude that the past AAR calculations are based upon statistics and apportionments of such limited probative value as to render them unsatisfactory as a measure of past per diem costs. We find that the complainants in docket No. 31358 have failed to sustain their burden of proving that the rates in issue are just, reasonable, and nondiscriminatory for use in the determination of per diem charges with respect to the defendants.

The complaints, as amended, seek specific findings for each and every month, at least through June, 1962. The record does not contain, nor, so far as appears, does the data exist, in such form as to make possible separate calculations as to ownership costs on a monthly basis. Maintenance of records on an annual basis precludes any attempt to analyze the costs with relation to shorter periods, although findings obviously may be applied on a monthly basis. Summary T-1 of Rail Form H provides a method of deriving a single average daily per diem cost applicable to all cars for years other than 1960, making use of the ratios and apportionments developed through the 1960 studies.

We have found that car owners will receive a fair return on the value of their investment in freight cars under a multilevel system by allowance of interest at 9 percent before taxes on 40 percent of original cost and 4 percent before taxes on 60 percent of original cost. Under that system, the allowance for depreciation of each car is related closely to its actual annual loss in value. When a single average rate is applied to all cars, having appreciably different original costs, compensation to

individual owners, or for particular cars, may not be as complete. This is an inevitable consequence of averaging. Insofar as rates for the past are concerned, the record permits only the latter method and our findings, made pursuant to the requests of the United States District Court and the Supreme Court of the State of New York, are on this basis.

As noted above, we are satisfied that strict adherence to the interest rates just mentioned will not compensate owners for the consequences of excess use of higher cost cars when a single average rate is used, but that application of the account No. 53 Index of freight car costs to the depreciation and interest base is improper. Summary T-1 of Rail Form H, however, includes an allowance for interest before taxes which results in an after tax return of 4 percent on the total original cost. The net effect is to allow car owners interest on the 40 percent investment in excess of 10 percent before taxes, while retaining a return of 3.849 percent before taxes to meet average interest costs of borrowed funds. This cost analysis also allows car owners substantial sums as depreciation charges on cars which had been fully depreciated under accelerated schedules pursuant to the defense amortization program prior to the period covered by the present dispute. We find that determination of just, reasonable, and nondiscriminatory rates for the past for the settlement of per diem balances between the plaintiffs and the defendants in docket No. 31358, can most effectively be accomplished by application of the cost analysis designated as Summary T-1 of Rail Form H, using the ratios and apportionments developed by the 1960 special studies. The summary calculations from Rail Form H, using the methods herein approved, for each year from 1953 through 1965, inclusive, are shown in the appendix to this report.

The defendants in docket No. 31358 contend that we should calculate and deduct from the per diem charges for the past years amounts which represent ownership repairs made by them and not reimbursed pursuant to AAR rules. We have heretofore expressed our view that the calculation of ownership costs and consequent per diem rates must include all costs properly attributable to the repair and maintenance of the cars. As amended, the complaint seeks specific findings as to the just and reasonable rates, which findings may be considered by the United States District Court and the New York Supreme Court in assessing damages. The per diem rate which is fair and reasonable must be measured by an equitable distribution of total ownership burden. It exists

independently of alleged offsets and must be found without reference to them.

Upon consideration of the record herein, we find that the just, fair, reasonable, and nondiscriminatory rates, proper as daily charges for the settlement of per diem balances by and between the parties to pending suits herein before described for the use of foreign per diem freight cars in and during each and every month from August 1953 through December 1965, inclusive are as shown below. The fluctuations in rates from year to year result from changes in economic activity and consequently the extent to which cars are utilized.

| *Year* | *Rate Per Day* |
|---|---|
| 1953 | $2.12 |
| 1954 | 2.37 |
| 1955 | 1.92 |
| 1956 | 1.96 |
| 1957 | 2.12 |
| 1958 | 2.60 |
| 1959 | 2.44 |
| 1960 | 2.50 |
| 1961 | 2.58 |
| 1962 | 2.76 |
| 1963 | 2.50 |
| 1964 | 2.69 |
| 1965 | 2.85 |

Our conclusions with respect to the present multilevel rates bar any attempt to furnish advice as to just and reasonable rates for the past on a multilevel basis. Available information limits our findings to the single, average rates shown above. Just and reasonable rates for years subsequent to 1965 may be calculated in the same manner as heretofore set forth.

Insofar as the rates approved here for the future are concerned, the respondents will be expected to give them a fair opportunity, through practical application. Proceedings such as those here presented are primarily in the nature of contractural disputes solely between carriers where settlements should be encouraged. After giving such rates a fair opportunity, the respondents will be expected to attempt first to reconcile any differences and reach

some agreement before calling upon the Commission to modify the rates prescribed, particularly since the underlying facts are within the carriers' own knowledge and control.

There is a clear distinction between the provisions of section 1(14)(a) herein applied and the recently confirmed statutory authority embodied in the new provisions enacted by the Congress. The former provisions, as interpreted by the courts, limit our powers to determining compensation (*basic* per diem) based strictly upon cost considerations. On the other hand, the latter provisions that empower us to set so-called incentive rates, which are obviously something above and beyond the regular or basic compensation, permit us to consider and give effect to factors other than costs, such as the need for encouraging the construction of new cars and for the general replenishing of the car fleet. While the incentive provisions are not involved in the instant proceedings and cannot be considered on this record, in other proceedings currently pending at various stages of administrative process, the Commission is moving toward determination of whether or not incentive rates should be established and the attendant question of modification of our present car service rules.

SUMMARY OF PRINCIPAL FINDINGS AND CONCLUSIONS

To recapitulate our findings and conclusions with respect to the principal matters in issue, upon consideration of the entire record herein, we find:

1. That in docket No. 31358 the per diem rates charged pursuant to the agreement, *Section 5a Application No. 7, Association of American Railroads, Per Diem, Mileage, Demurrage and Storage—Agreement,* approved August 28, 1950, from and after August 1, 1953, have not been shown to be just, fair, reasonable and nondiscriminatory;

2. That in docket No. 31358, the just, fair, reasonable, and nondiscriminatory rates, proper as daily charges for the settlement of per diem balances by and between the parties to pending suits hereinbefore described for the use of foreign per diem freight cars in and during each and every month from August 1953 through December 1965, are those set forth above, and that the just, fair, reasonable, and nondiscriminatory rates for these purposes for the period subsequent to January 1, 1966, until the effective date of the rates herein prescribed shall be

ascertained by the methods employed herein to calculate the rates found reasonable for the prior years;

3. That the performance of orderly and efficient transportation service by rail in the future requires the uniform observance of per diem charges by all railroads and the prescription of such uniform charges by this Commission pursuant to the authority contained in section 1(14)(a) of the Interstate Commerce Act;

4. That reasonable compensation to owners of freight cars in per diem service requires an appropriate allowance for the impact of inflation upon the funds invested by them, and that allowance of 40 percent of the original cost of freight cars as that portion fairly representative of the average owner's investment, and the allowance of a return of 9 percent interest before income tax upon such amount provides reasonable compensation therefor and includes a fair return upon the value of their investment;

5. That reasonable compensation to owners of freight cars in per diem service requires the calculation of ownership costs as provided hereinbefore, including prescription of a method of allocating and computing costs of repair and maintenance, taxes, and capital investment;

6. That reasonable compensation to car owners requires that the ownership costs be distributed among and borne equitably by all railroads making use of such cars in just proportion to the amount of use, that the use made of cars must be measured by both the length of time cars are held and the amount of activity to which they are subjected, and that the most practicable and reliable method of measuring car activity is the line-haul mileage over which they are moved;

7. That the cost of repair and maintenance of freight cars should be distributed between time and mileage, one-half to each, and that the reduction in value of cars resulting from their employment in transportation service should be spread over a period of 30 years, allowing 3 percent of the original cost per year therefor, and distributing the annual amount 40 percent to mileage and 60 percent to time, as the causal factors therefor;

8. That reasonable compensation to car owners requires that ownership costs be closely related to the original cost of cars and that rates productive of such compensation vary within original cost brackets no more than $2,000 in scope;

9. That adjustments to the calculated costs of car ownership to reflect alleged deficiencies in the schedules of payments used by railroads to reimburse each other for repairs made to cars of each other would not result in reasonable compensation to car owners; and

10. That reasonable compensation to car owners requires the payment by all railroads of the time and mileage rates set forth in table C, *supra*, from and after the effective date of the order in docket No. 33145.

Commissioner Walrath, being necessarily absent, did not participate.

*It is ordered*, That the proceeding in docket No. 31358 be, and it is hereby, discontinued.

*It is further ordered*, That the complaint in docket No. 34405, except to the extent to which the relief sought has been granted by order in docket No. 33145, be, and it is hereby, dismissed.

*It is further ordered*, That on and after October 1, 1968 the respondents in docket No. 33145 be, and they are hereby, required to maintain accurate records of both the days on-line of foreign per diem freight-train cars and the line-haul mileage over which they move each such car, and to pay to the owners of said cars the charges per day and per mile set forth in rate table C, in this report; that this order shall continue in force and effect until the further order of the Commission; and that the charges herein provided shall be paid for each day foreign cars are held but nothing in this report and order shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts;

*And it is further ordered*, That the order of the Commission dated October 5, 1962, which required respondents in docket No. 33145 to preserve all records, data and information underlying the reports filed by them in connection with said proceeding until further order, be, and it is hereby, canceled.

By the Commission.

H. NEIL GARSON,
*Secretary*.

(SEAL)

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# APPENDIX

*Pertinent portions of the report recommended by Hearing Examiner Robert C. Bamford*

## Cost Section Studies

To facilitate the investigation in docket No. 33145, the Commission incorporated in the order of investigation an order under section 20 of the act, requiring the filing of special reports by the carriers. The tentative form of these reports and the nature of the studies to be accomplished in preparing them were thereafter established as a result of conferences between attorneys and accountants for interested parties, a representative of the Association of American Railroads (AAR), and staff members of the Cost Finding Section, Bureau of Accounts, of the Commission. After a formal prehearing conference, at which copies of the proposed forms were distributed, all parties were afforded an opportunity to file verified statements for or against them, and thereafter to file rebutatl statements. After study of these statements and consideration of the contentions of the parties, the final form of the reports was determined by the Cost Section staff and served on all railroads. Only the class I line-haul roads were required to complete all of the forms. Other roads, including short lines, switching and terminal companies and electric railways, were required to complete only forms 1, R-1A, and 10. The nature of the special studies which were made is indicated by the list of reporting forms, as follows:

Form A — Preliminary Survey of Equipment Repair Facilities.

1 — Special Study of Freight-train Car-miles and Car days.

R-1A— Report of Per Diem Days and Payments.

2 — Special Study of Amounts charged to Account 314 for Direct Wages Applicable to Freight-train Car Repairs.

3 — Special Study of Amounts Charged to Account 314 for Direct Materials Applicable to Freight-train Car Repairs.

4 — Summary of Special Study of Work of Freight-train Car Inspectors.

5 — Separation of Account 314—Freight-train Cars—Repairs.

6 — Separation of Number of Cars, Original Cost, Equipment Obligations and Interest thereon, Applicable to Freight-train Cars, between Per Diem Cars and All Other Freight-train Cars.

7A — Special Study of Switch Engine-Hours Applicable to Freight-train Car Repairs.

7B — Non-revenue Freight Used in Equipment Repairs.

7C — Maintenance of Power Facilities for the Year 1960.

7D — Analysis of Certain Items Reported in Annual Report, Schedule 376—Hire of Freight Cars, for the Year 1960.

7E — Maintenance of Work Equipment.

7F — Maintenance of Miscellaneous Equipment.

8 — Taxes Applicable to Freight-train Car Ownership.

9 — Analysis of Relation Between Investment in Shops and Enginehouses and Cost of Repairs Made in Such Facilities.

10 — Survey of Car Accounting Methods.

11 — Special Study of Accounting for Repacking of Journal Boxes.

The studies were accomplished during the calendar year 1960 and, during the course of that year, the Cost Section sent to the respondents a series of five documents of explanatory matter, based upon questions raised regarding the studies. Special arrangements were made to assign field examiners of the Bureau of Accounts to assist, and 34 such examiners were used for this purpose. During the study period they made 97 visits to 69 shops, trainyards, or railroad offices, located in 29 different States. Their reports were sent to the Cost Finding Section and, if any discrepancies appeared in the manner in which the carrier was conducting the special studies, correction thereof was requested. Certain of the forms were required to be filed for the first quarter of the year and, after audit thereof, and testing their results against 1959 reported data, any data which appeared of doubtful accuracy was referred to the particular carrier for further check.

On May 23, 1961, there was appointed an industry advisory committee on per diem costs consisting of representatives from the Baltimore and Ohio, Chicago, Burlington & Quincy, Illinois Central, New York, New Haven and Hartford, Long Island and Boston and Maine Railroads, and the American Short Line Railroad Association. The views of this group were sought, after conference with staff members of the Cost Finding Section, as to a proposed treatment of the deficiency of the reimbursement for the repairs of foreign per diem cars.

The special studies were accomplished, and reported on the prescribed forms, by 104 class I line-haul railroads. To the extent they were required to do so, reports were also received from other lines, as follows:

| | |
|---|---|
| Class II line-haul railroads | 72 |
| Class I switching and terminal companies | 27 |
| Class II switching and terminal companies | 45 |
| Line-haul electric railways | 3 |
| Other electric railways | 3 |
| Total short lines | 155 |
| Class I line-haul railroads | 104 |
| Total reporting roads | 259 |

From the information received as a result of these special studies, and the annual reports of the carriers, together with certain data obtained from the Section of Valuation of the Bureau of Accounts, the Cost Finding Section made a series of cost computations, more specifically described below, which were subsequently received in evidence after extensive cross-examination of the staff officials responsible for their preparation. The Cost Section also prepared and offered in evidence a cost formula for consideration by the Commission, designed to develop costs of per diem car ownership, should it be concluded that prescription of a formula was desirable.[14]

The results of the Cost Section's computations are presented in four tables which are designated Summary T-1,

[14] This formula is designated by the Cost Section as Rail Form H. No. 7-62, *Formula for Use in Determining Per Diem Charges for the Use of Freight-train Cars*. It will be referred to hereinafter as Form H.

Summary MT-1, MT-2, and Summary MT-3.[15] Summary T-1 computes a single-factor, per diem unit cost for foreign per diem cars, in a manner similar to that heretofore employed by the AAR for the same purpose. It makes no allowance for age, value or type of cars, nor does it separate mileage costs from other types of costs. As computed, based upon 1960 figures, it indicates a unit cost of 249.903 cents per car per day.[16] This summary also computed a total and a daily average amount of deficiency in the reimbursement received by railroads for repairs made by them to cars of other lines amounting, using 1960 figures, to 41.417 cents per day.

Summary MT-1 separates unit costs for all per diem cars into those attributable to mileage, and those attributable to all other causes, the latter being designated as "time" costs. This was accomplished by separating ownership costs for all cars according to percentages for mileage and time, developed by the Valuation Section of the Bureau of Accounts. The total mileage costs were reduced to a unit cost per car-mile by dividing by the total line-haul and switching miles, after adjusting the latter by a factor purporting to reflect the greater repair costs engendered by switch movements. The time portion of the total costs was divided by the total active per diem car days for all railroads to develop the unit cost per active car day. The cost per mile thus developed, using 1960 figures, was 2.323 cents, and the cost per car day, 148.738 cents. These figures were not designed to directly ascertain car rental costs, since railroads do not maintain

[15] The cost analyses supporting these summaries are also contained in the exhibits of the Cost Section.

[16] The methods used by the Cost Section to reduce annual costs to daily costs are set forth in more detail in discussing issues connected therewith.

car records of switching mileages, but the figures were computed as a necessary step preliminary to the computations in the following summaries. Both summaries T-1 and MT-1 employ the original cost of freight cars and of freight car repair facilities as a basis for the computation of depreciation and interest on depreciated investment. Since one of the contentions in these cases involves the choice between use of original and reproduction costs, the summaries were each provided with an alternative calculation based upon the latter theory, by which they may be adjusted.

Summary MT-2 develops a unit daily cost for each of the class I line-haul railroads separately, and for class II roads by groups, as well as individually for the defendant railroads in docket No. 31358 and for the various different groups of reporting railroads in the special study program. In this summary the unit daily costs are computed to show the amount each railroad, or group of roads on an average, contributes to the costs of ownership of foreign cars on their lines taking into account the average mileage over which they move such cars. It differs from summary T-1 in that while still designed to return to car owners their full costs of ownership, it refines the data so as to reflect differences between using lines measured by the use they make of the cars. Thus, for each railroad in this summary, the mileage cost developed in MT-1 is multiplied by the 1960 line-haul and equated switching car-miles of foreign per diem cars on the particular carrier, and the result divided by the per diem days paid for by that carrier in the same year, to reduce the mileage charge to a daily amount. Similarly, the time cost developed in summary MT-1 is divided by the particular carrier's daily average ratio of active foreign per diem cars on its line to total foreign per diem cars on its line, to produce unit time costs per total car

day. Addition of the time costs, and the mileage costs reduced to a time basis, produces a daily unit charge applicable to each carrier, or group of carriers, for which the computation was made. The unit cost for all United States railroads computed by the method in MT-2, which is comparable to the unit cost of 249.903 cents per day in summary T-1, is 277 cents, made up of a mileage factor of 138 cents and a time factor of 139 cents. The difference results from giving effect to mileage, since foreign per diem cars run more miles per day than the combined average of all per diem cars. Like summary T-1, there is included in this computation no allowance for age, value or type of cars. The deficiency in user roads recovery of repair costs, developed in summary T-1, may be directly applied to the results reached by application of the MT-2 formula.

Summary MT-3 furnishes an alternative method of calculating the per diem car rental costs chargeable to individual user railroads, taking the mileage factor into account, but without computing a daily rate based upon each carrier's average operations. It is designed to develop, rather, time charges based upon the time each car is actually retained by the user road, and mileage charges based upon the mileage each car is actually moved by the user road. The factor for average switching costs is reduced to a daily amount and included in the time costs, resulting in a daily charge of 149 cents. The mileage cost of 2.323 cents developed in summary MT-1 is applied to line-haul mileage only. Use of this method requires that precise car records be kept showing, not only the days each foreign per diem car is on line, but the total miles traveled by it.

At the hearings it appeared that other factors, such as the age, value, or type of car, might deserve consideration. As a result, the Cost Section, utilizing the data and com-

putations heretofore described, made certain additional calculations to the extent possible within the limits of available information, tending to show the results of computing costs using each of the formulas, T-1, MT-1, MT-2, and MT-3, with depreciation and interest on depreciated investment computed on different car values, using both original and reproduction cost bases. Since the special studies did not provide for separation of repair costs, et cetera, by value of car, it was assumed that all costs other than depreciation and return would remain the same regardless of the value or age of the car. For convenience of comparison, the value brackets used in this computation are the same as employed in the AAR multilevel rates now in effect. Issues concerning the details and results of the Cost Section studies are considered subsequently in this report.

## AAR CALCULATIONS

Per diem calculations by the AAR staff during the past 15 years have followed the same general pattern but have differed in their details with respect to each rate. Cost statistics for a recent 12-month period have been used in each instance and figures developed for repairs to cars, property taxes, depreciation on cars and on apportioned value of shops, enginehouses, power plants and shop and power plant machinery, interest on depreciated value of the same, apportioned cost of general expense, miscellaneous maintenance of equipment accounts, maintenance of shops, enginehouses, et cetera, interest on investment in stock of freight car material, interest on working capital, and deadhead haul cost of repair material. Each was divided by a car-day divisor to develop a unit cost per day, and the results totaled. Generally the AAR staff calculated alternative costs, using different bases, such as ledger value, reproduction value, et cetera, leaving to the

general committee and the board of directors of the AAR the decision as to which result should be submitted to the subscribers to the agreement for vote.

The car-day divisor has regularly been computed by taking the average of the ratios, for varying numbers of years, which total cars, less bad order and surplus cars on owners' lines, bore to total cars. This average ratio, applied to the number of days in the year for which the cost statistics were calculated, produced a figure referred to as "active car days per car per year"; which was multiplied by the average number of cars in service during that year.[18] Prior to the calculations supporting the $2.40 rate, periods of from 5 to 15 years had been used. For all the rates now in issue, the average of car utilization ratios for the preceding 20-year period were used.

For the calculation of car repair expenses, the costs of the most recent year were used in calculations supporting the $2.75 and earlier rates. In the calculations supporting the $2.88 and multilevel rates, the repair expenses for the most recent 5-year period were averaged, after adjusting them to the wage and price level of the most recent year.

Depreciation on freight cars has always been calculated on a straight-line basis at the average of rates used by the carriers and approved by the Commission, except that calculations supporting the multilevel rates used a flat 3 percent rather than the average of 3.06 percent. Beginning with the calculations supporting the $2.40 rate,

[18] The calculations supporting the $2.88 and multilevel rates differed in that two car-day divisors were employed. The total cars at the end of the year was employed to calculate unit cost of depreciation and interest on freight cars while the average of the cars in use at the beginning and end of the year was used for all other costs.

reproduction cost of the cars was used as the base for depreciation. Depreciation on apportioned value of shops, enginehouses, et cetera, has been based upon original cost in all calculations except that supporting the $2.40 rate, when the reproduction costs basis was employed.

Interest on investment has been calculated at 6 percent before taxes on both freight cars and repair facilities, using the average of depreciated original and reproduction costs as a base for the $2.40 rate and depreciated reproduction cost as a base for subsequent rates. Prior to the $1.50 rate the calculations had differed, with depreciated original cost used as the base for interest on repair facilities.

In developing the multilevel rates, the AAR staff calculated the annual costs per car for all items mentioned above except interest and depreciation on freight cars. The latter were separately calculated with respect to each of the value brackets, using reproduction cost as a base. Inauguration of rates graduated according to the value of the car imposed substantial changes in the system which had theretofore prevailed in accounting for the compensation payments. With a single rate applicable to all cars, carriers had only to determine from the junction reports, showing when cars were received and delivered to each carrier, the total number of days per diem to be multiplied by the rate. It is now necessary to determine the number of days for each car and the rate bracket applicable to that car, calculating charges on each car separately.

Administration of the multilevel rate system was established by the organization of a control center within the Operating Transportation Division of the Association of American Railroads. On March 29, 1963, the board of directors of the AAR authorized an appropriation for

this purpose, to acquire office space, equipment, data processing machinery and necessary employees. The first instructions to all United States, Canadian and Mexican railroads were sent out on May 6, 1963, and revised on June 25, 1963. They included forms for reporting all cars at their original cost, and the amounts of additives to those costs, if any, together with sundry information including the year installed, whether new, rebuilt, or second-hand, AAR mechanical designation, et cetera. A table was included from which the multilevel rate applicable to each car could be ascertained. A standard punch card method of reporting the same data was provided for car owners having the equipment for this purpose. Where owners reported on the forms, the cards were punched at the control center.

All railroads had reported, as requested, by the latter part of September 1963 and a preliminary master list of all per diem cars was distributed to all railroads on October 10, 1963, listing 1,786,414 cars in alphabetic code, mechanical designation and car series order. Also distributed on that date was a preliminary alternate master list covering the same cars, but listed without regard to mechanical designation. To the railroads submitting requests therefor, there was distributed the same data on magnetic tapes and on master series decks of cards, for use in appropriate data processing machines. Between September and December 31, 1963, numerous corrections to the reports were submitted by the railroads, caused by cars retired and installed, and changes in mechanical designation, and changes in valuation. All were processed through the end of the year and, on January 15, 1964, master list No. 1 and alternate master list No. 1, in written as well as magnetic tape and punch card form, were distributed. The function of the control center thereafter was, and will continue to be, the processing of reported

changes in cars and the monthly publication of corrections to the master list. The first three such publications in 1964 contained, on an average, about 5,000 changes each.

In choosing a rate to be submitted to the members of the per diem agreement for vote, the AAR officials customarily have considered the various calculations received from the staff, on occasion revised them in some respect, and rounded off the results to produce an even number of cents per day. Thus, calculations of $2.76961 and $2.87940 were rounded to $2.75 and 2.88. While the validity of the calculations used in ascertaining the costs have been challenged in these proceedings, it is clear that the AAR rates have purported to do no more than equate the daily ownership costs of freight cars in per diem service.

* * *

Assignment of cars to appropriate brackets is accomplished on the basis of their depreciated original cost plus additions and betterments. When cars were built in their own shops, car owners may include in the original cost certain expenses which may not have been capitalized at the time of building.

* * *

In its 1955 decision, the Commission observed that freight car repairs constituted the largest single category of expense included in the car rental charge, amounting to some 40 percent of the total.[9] The special studies conducted by the Cost Section during 1960 were, in large part, directed to the problem of analyzing the cost of repairs to per diem cars and development of data which would aid in resolving some of the issues raised in respect to those costs. Particular attention was given to separa-

[9] The report in *Alabama, T. & N. R. Co. v. Aberdeen & R. R. Co.*, 274 I. C. C. 383, indicates that repair costs were, in 1949, about 44 percent of the total costs employed in fixing the per diem rate.

tion of the expenses charged to account No. 314 which, as noted in the 1955 report, is the largest of the primary operating expense accounts embracing nearly 10 percent of total freight expense. The basic separation in connection with all repair expenses was between home and foreign per diem cars, with repairs to each separated between owner and user responsibility work.[32] Two sample studies were made, using forms 2 and 3, heretofore mentioned, and covering seven periods of 2 days each at intervals during 1960, to develop the proportion of repair wages and materials applied in each of these categories by repair facilities. Another test, using form 4, covering seven test periods of 1 day each at intervals during the year, was conducted to develop the proportion of wages of car inspectors assignable to various of their functions, including repairs made by them in trainyards. This study also sought to develop the cost of materials used in the making of such repairs and the consist of the trains inspected. These studies were carried out by all class I line-haul carriers, and analysis thereof indicates that about 79 percent of all wage and material costs were items of ownership responsibility and 7 percent items of user responsibility. The remaining 14 percent involved non-per diem cars which are not involved in these proceedings.[33] The total ownership repair costs for 1960, as computed by the Cost Section, amounted to $583,715,117, and comprised over 46 percent of the total expenses included in the per diem cost calculation.

[32] Definitions of these and other terms used in the studies are set forth in appendix A to this report. The distinction is necessary to insure inclusion in the per diem charge only those costs which should fairly be shared by all users. Repairs due to improper use of the car are not shared under this separation.

[33] In all studies non-per diem cars, including cabooses and mileage cars, were excluded, and the costs applicable thereto separated from the analysis.

*Rail Form H—Summary T-1 docket No. 31358 cost calculation*

| Line No. | Item | Aggregate ownership costs | Per diem unit cost (cents) |
|---|---|---|---|
| | *1953* | | |
| 1 | Freight-train car repairs | $679,141,264 | 123.865 |
| 2 | Depreciation—cars | 163,087,704 | 29.744 |
| 3 | Depreciation—facilities | 6,980,345 | 1.273 |
| 4 | Property taxes—cars | 64,212,598 | 11.712 |
| 5 | Property taxes—facilities | 3,433,615 | .626 |
| 6 | Payroll taxes | 19,476,702 | 3.553 |
| 7 | Return on investment—cars | 201,930,867 | 36.829 |
| 8 | Return on investment facilities | 10,756,924 | 1.962 |
| 9 | Hire of freight cars | 9,431,201 | 1.720 |
| 10 | Return on working capital | 3,978,983 | .726 |
| | Total | 1,162,430,203 | 212.010 |
| | *1954* | | |
| 1 | Freight-train car repairs | 554,890,318 | 126.055 |
| 2 | Depreciation—cars | 169,767,994 | 38.567 |
| 3 | Depreciation—facilities | 7,043,238 | 1.600 |
| 4 | Property taxes—cars | 63,311,400 | 14.382 |
| 5 | Property taxes—facilities | 3,438,457 | .781 |
| 6 | Payroll taxes | 18,146,192 | 4.122 |
| 7 | Return on investment—cars | 199,041,096 | 45.216 |
| 8 | Return on investment—facilities | 10,875,323 | 2.470 |
| 9 | Hire of freight cars | 11,242,442 | 2.554 |
| 10 | Return on working capital | 3,296,897 | .749 |
| | Total | 1,041,053,357 | 236.499 |

| Line No. | Item | Aggregate ownership costs | Per diem unit cost (cents) |
|---|---|---|---|
| | *1955* | | |
| 1 | Freight-train car repairs | 603,286,136 | 104.959 |
| 2 | Depreciation—cars | 171,434,763 | 29.826 |
| 3 | Depreciation—facilities | 7,363,580 | 1.281 |
| 4 | Property taxes—cars | 67,140,565 | 11.681 |
| 5 | Property taxes—facilities | 3,668,064 | .638 |
| 6 | Payroll taxes | 19,501,025 | 3.393 |
| 7 | Return on investment—cars | 203,184,954 | 35.350 |
| 8 | Return on investment—facilities | 11,062,659 | 1.924 |
| 9 | Hire of freight cars | 14,893,645 | 2.591 |
| 10 | Return on working capital | 3,179,292 | .553 |
| | Total | 1,104,714,683 | 192.198 |
| | *1956* | | |
| 1 | Freight-train car repairs | 644,379,078 | 106.545 |
| 2 | Depreciation—cars | 176,897,170 | 29.249 |
| 3 | Depreciation—facilities | 7,505,969 | 1.241 |
| 4 | Property taxes—cars | 72,150,484 | 11.930 |
| 5 | Property taxes—facilities | 3,771,113 | .624 |
| 6 | Payroll taxes | 23,131,938 | 3.825 |
| 7 | Return on investment—cars | 222,568,063 | 36.801 |
| 8 | Return on investment—facilities | 11,259,737 | 1.862 |
| 9 | Hire of freight cars | 18,254,405 | 3.017 |
| 10 | Return on working capital | 3,496,749 | .579 |
| | Total | 1,183,414,706 | 195.673 |

| Line No. | Item | Aggregate ownership costs | Per diem unit cost (cents) |
|---|---|---|---|
| | *1957* | | |
| 1 | Freight-train car repairs | $651,821,299 | 110.972 |
| 2 | Depreciation—cars | 192,614,649 | 32.792 |
| 3 | Depreciation—facilities | 7,642,434 | 1.301 |
| 4 | Property taxes—cars | 78,420,978 | 13.351 |
| 5 | Property taxes—facilities | 3,816,368 | .649 |
| 6 | Payroll taxes | 23,785,664 | 4.049 |
| 7 | Return on investment—cars | 251,923,349 | 42.890 |
| 8 | Return on investment—facilities | 11,352,234 | 1.933 |
| 9 | Hire of freight cars | 21,226,295 | 3.614 |
| 10 | Return on working capital | 3,003,640 | .511 |
| | Total | 1,245,606,910 | 212.062 |
| | *1958* | | |
| 1 | Freight-train car repairs | 557,905,703 | 123.417 |
| 2 | Depreciation—cars | 207,207,427 | 45.837 |
| 3 | Depreciation—facilities | 7,573,445 | 1.675 |
| 4 | Property taxes—cars | 79,409,419 | 17.565 |
| 5 | Property taxes—facilities | 3,754,155 | .830 |
| 6 | Payroll taxes | 21,964,085 | 4.859 |
| 7 | Return on investment—cars | 256,308,192 | 56.699 |
| 8 | Return on investment—facilities | 11,222,647 | 2.483 |
| 9 | Hire of freight cars | 25,839,462 | 5.716 |
| 10 | Return on working capital | 3,004,609 | .664 |
| | Total | 1,174,182,144 | 259.747 |

| Line No. | Item | Aggregate ownership costs | Per diem unit cost (cents) |
|---|---|---|---|
| | *1959* | | |
| 1 | Freight-train car repairs | 603,784,873 | 118.498 |
| 2 | Depreciation—cars | 210,695,645 | 41.351 |
| 3 | Depreciation—facilities | 7,846,928 | 1.541 |
| 4 | Property taxes—cars | 81,335,604 | 15.963 |
| 5 | Property taxes—facilities | 3,847,571 | .755 |
| 6 | Payroll taxes | 26,470,719 | 5.196 |
| 7 | Return on investment—cars | 262,253,764 | 51.469 |
| 8 | Return on investment—facilities | 11,364,753 | 2.230 |
| 9 | Hire of freight cars | 32,890,216 | 6.455 |
| 10 | Return on working capital | 2,997,354 | .588 |
| | Total | 1,243,487,429 | 244.046 |
| | *1960* | | |
| 1 | Freight-train car repairs | 583,715,117 | 116.113 |
| 2 | Depreciation—cars | 214,654,958 | 42.700 |
| 3 | Depreciation—facilities | 8,023,021 | 1.596 |
| 4 | Property taxes—cars | 82,153,074 | 16.342 |
| 5 | Property taxes—facilities | 3,824,341 | .760 |
| 6 | Payroll taxes | 28,140,156 | 5.597 |
| 7 | Return on investment—cars | 272,469,259 | 54.200 |
| 8 | Return on investment—facilities | 11,489,897 | 2.286 |
| 9 | Hire of freight cars | 48,929,073 | 9.733 |
| 10 | Return on working capital | 2,896,316 | .576 |
| | Total | 1,256,295,212 | 249.903 |

| Line No. | Item | Aggregate ownership costs | Per diem unit cost (cents) |
|---|---|---|---|
| | *1961* | | |
| 1 | Freight-train car repairs | $542,296,733 | 114.025 |
| 2 | Depreciation—cars | 219,854,362 | 46.227 |
| 3 | Depreciation—facilities | 7,972,133 | 1.676 |
| 4 | Property taxes—cars | 78,986,170 | 16.608 |
| 5 | Property taxes—facilities | 3,686,054 | .775 |
| 6 | Payroll taxes | 26,091,704 | 5.486 |
| 7 | Return on investment—cars | 274,381,398 | 57.692 |
| 8 | Return on investment—facilities | 11,569,671 | 2.433 |
| 9 | Hire of freight cars | 58,820,065 | 12.367 |
| 10 | Return on working capital | 2,778,174 | .584 |
| | Total | 1,226,436,464 | 257.873 |
| | *1962* | | |
| 1 | Freight-train car repairs | 560,508,850 | 122.210 |
| 2 | Depreciation—cars | 227,907,354 | 49.692 |
| 3 | Depreciation—facilities | 7,963,807 | 1.736 |
| 4 | Property taxes—cars | 76,570,423 | 16.694 |
| 5 | Property taxes—facilities | 3,518,132 | .767 |
| 6 | Payroll taxes | 27,554,545 | 6.008 |
| 7 | Return on investment—cars | 281,404,864 | 61.355 |
| 8 | Return on investment—facilities | 11,502,266 | 2.508 |
| 9 | Hire of freight cars | 68,949,490 | 15.033 |
| 10 | Return on working capital | 2,847,599 | .621 |
| | Total | 1,268,727,330 | 276.624 |

| Line No. | Item | Aggregate ownership costs | Per diem unit cost (cents) |
|---|---|---|---|
| | *1963* | | |
| 1 | Freight-train car repairs | 550,322,495 | 108.968 |
| 2 | Depreciation—cars | 235,414,671 | 46.614 |
| 3 | Depreciation—facilities | 8,071,570 | 1.598 |
| 4 | Property taxes—cars | 71,238,098 | 14.106 |
| 5 | Property taxes—facilities | 3,385,171 | .670 |
| 6 | Payroll taxes | 27,145,511 | 5.375 |
| 7 | Return on investment—cars | 273,339,558 | 54.123 |
| 8 | Return on investment—facilities | 11,645,943 | 2.307 |
| 9 | Hire of freight cars | 76,831,485 | 15.213 |
| 10 | Return on working capital | 2,665,587 | .528 |
| | Total | 1,260,060,089 | 249.502 |
| | *1964* | | |
| 1 | Freight-train car repairs | 564,752,370 | 111.906 |
| 2 | Depreciation—cars | 249,246,959 | 49.389 |
| 3 | Depreciation—facilities | 8,088,396 | 1.603 |
| 4 | Property taxes—cars | 81,165,680 | 16.083 |
| 5 | Property taxes—facilities | 3,257,518 | .646 |
| 6 | Payroll taxes | 28,162,325 | 5.580 |
| 7 | Return on investment—cars | 320,427,320 | 63.492 |
| 8 | Return on investment—facilities | 10,557,090 | 2.092 |
| 9 | Hire of freight cars | 90,957,044 | 18.023 |
| 10 | Return on working capital | 2,750,841 | .545 |
| | Total | 1,359,365,543 | 269.359 |

| Line No. | Item | Aggregate ownership costs | Per diem unit cost (cents) |
|---|---|---|---|
| | *1965* | | |
| 1 | Freight-train car repairs | $562,290,338 | 110.712 |
| 2. | Depreciation—cars | 266,697,638 | 52.511 |
| 3 | Depreciation—facilities | 8,143,383 | 1.604 |
| 4 | Property taxes—cars | 87,570,856 | 17.242 |
| 5 | Property taxes—facilities | 3,324,476 | .655 |
| 6 | Payroll taxes | 29,179,129 | 5.745 |
| 7 | Return on investment—cars | 355,651,226 | 70.025 |
| 8 | Return on investment—facilities | 10,754,036 | 2.117 |
| 9 | Hire of freight cars | 119,334,451 | 23.496 |
| 10 | Return on working capital | 2,946,264 | .580 |
| | Total | 1,445,891,797 | 284.687 |

## APPENDIX F

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 56-1004-G

BOSTON AND MAINE RAILROAD ET AL.,

*Plaintiffs,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

*Defendants.*

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CIVIL ACTION No. 68-79-G

BOSTON AND MAINE CORPORATION,

*Plaintiff,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

*Defendants.*

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Woodbury,* *Senior Circuit Judge,* and Wyzanski and Garrity, *District Judges.*

OPINION OF THE COURT

March 18, 1969

WOODBURY, *Senior Circuit Judge.* This is another chapter in protracted litigation, primarily between long-haul freight originating railroads and short-haul freight ter-

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* Sitting by designation.

minating railroads, over the price one railroad should pay for the use on its line of another railroad's freight cars. In a previous chapter this court held, one judge dissenting, that the Interstate Commerce Commission had jurisdiction to enter an order at the behest of the long-haul roads that the rates for freight car use fixed by the Association of American Railroads (AAR) were just, reasonable and otherwise lawful and must be observed. *Boston & Maine Railroad* v. *United States,* 162 F. Supp. 289 (U. S. D. C., Mass. 1958). But the court remanded, directing the Commission to give further and more detailed consideration to the propriety of basing the rate, at least in part, on the distance a foreign car traveled on a using railroad's line instead of solely upon the time the car was on the user's line as had been the practice since about the turn of the century.[1] The Supreme Court, on representations of the Commission that it would follow the mandate of this court and undertake a study in depth of the problem under the power conferred upon it by §1(14)(a) of the Interstate Commerce Act,[2] dismissed cross appeals as prematurely presenting the question of the Commission's jurisdiction to issue a declaratory order in the premises. *Boston & Maine Railroad* v. *United States,* 358 U. S. 68 (1958).

Pursuant to its memorandum to the Supreme Court, the Commission reopened the case remanded to it and, consolidating with it two other cases pending before it under §1(14)(a), embarked upon a thorough, full-scale study of the problem. In January 1968 the Commission handed down a decision and order in the consolidated cases in which it concluded upon consideration of the voluminous record that the past calculations of the AAR were based

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[1] This history of *per diem* as it is known, is outlined in the previous opinion of this court and cases therein cited. No purpose would be served by recapitulation here.

[2] 40 Stat. 101 as amended, 41 Stat. 476, 49 U. S. C. §1(14)(a).

upon statistics and apportionments of such limited probative value as to render them unsatisfactory as a measure of past *per diem* costs. In consequence it found that the complainants in the original case asking for a declaratory order that the AAR rates were just, reasonable and otherwise lawful, that is, the long-haul railroads, had failed to sustain their burden of proving that the rates in issue were indeed just, reasonable and non-discriminatory for use in determining *per diem* charges with respect to the defendants, the short-haul railroads. In the other cases before it the Commission in the exercise of its powers under §1(14)(a), *supra,* fixed separate rates for freight car use for each year from 1953 to 1965, inclusive, and provided that car use rates thereafter should be calculated in accordance with a rate table which itemized and valued each factor included in calculating the rate. The Commission's study convinced it that a line-haul mileage factor should be included in the rate for car use and provided that future rates should be separately calculated, assessed and paid not only with respect to the number of days cars are held on line but also with respect to the number of miles moved by users in line-haul service.[3] Consequently the Commission required railroads to keep records of line-haul use as well as records of days cars are on a user's line. The Commission did not base past *per diem* rates in any part upon mileage because it said no records existed upon which to determine the actual mileages of foreign *per diem* cars during past periods, or even to make any reliable estimate of the mileages of such cars.

The consolidated actions before us are to enjoin, set aside and annul the report and order of the Commission outlined above.

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[3] It did not include mileage in switching service because it said it would be impractical for railroads to keep records of mileage in such service.

> "In attempting to find a measure of the just apportionment of car-hire costs, the railroads and the Commission have had to face a condition of extraordinary complexity, and not a theory. The Fifth Amendment does not command the impossible. It does not demand that the power and duty of the Commission to make the apportionment be thwarted by requiring it to adopt a standard of unattainable exactness. The validity of what is of necessity a rule of thumb, best adapted to secure a just apportionment, can hardly depend upon a perfect precision in its application; its imperfections in this respect are themselves compensated by an advisedly sought simplicity and convenience of operations." Mr. Justice Stone, dissenting in *Chicago R. I. & P. Railway Co.* v. *United States,* 284 U. S. 80, 116 (1931).

Viewing the cases before us in the light of the above observations, in which Justices Holmes and Brandeis concurred, and which we think eminently appropriate, we find no error in the Commission's actions.

Several medium and long-haul railroads as intervenors make common cause with the United States in supporting the Commission's action. Short-haul railroads, primarily the Boston and Maine and the Trustees of the New York, New Haven and Hartford, for convenience B&M and NH hereinafter, challenge the Commission's action on several grounds.

The challengers strenuously assert that the Commission by its action requires them to pay certain car repair items twice.

Under the rules of the AAR car owners are responsible for repairs attributable to ordinary wear and tear, and

car users are responsible for car repairs made necessary by damage "due to unfair usage or improper protection by the using line." Obviously certain car repairs have to be made to foreign cars when on a user's line to make the cars safe and serviceable. Such repairs are made by the using line which charges the repairs to the car owner at rates fixed by the AAR for specific repairs. The complaining railroads contend that the rates fixed by the AAR are below costs which results in a car repair deficiency in the amount, they say, of about 98 million dollars per year. They assert that the Commission has included this figure in fixing the *per diem* whereby the railroads pay this deficiency twice, once when they repair the foreign car and again in the *per diem* rate for the use of the car.

The Commission did not overlook this assertion. It said: "Upon all evidence, it is found that the car repair deficiency to the extent that it actually exists, should be corrected by adjustment in the AAR billing rates, and that any attempt to compensate for the deficiency by a deduction from the car rental charge would be unreasonable." Moreover the Commission pointed out that the B&M and the NH railroads actually benefited from the low repair costs because, as freight terminating roads with a surplus of foreign cars available for their own loadings, they could, as they in fact did, exercise a good deal of selectivity in the choice of cars to repair and load, whereas the long-haul freight originating railroads with their demand for cars could not be as selective, so that as a result the B&M and NH profited substantially every year by having their cars repaired by other roads more cheaply than they could repair their cars themselves.

*Per diem* rates and car repair deficiency to the extent that it actually exists may be interrelated. But there is nothing in the statute or in any court decision we know of requiring the Commission to treat the two as inextricably

linked. We think it well within the bounds of the Commission's discretion to treat the items separately, at least until the short-haul lines make some attempt to change AAR repair rates if they think change to their financial advantage.[4]

The Commission's decision that line-haul mileage is an essential element of just and reasonable compensation for the future does not mean, as the B&M and NH contend, that the Commission's determination that rates for the past should be based upon time on line alone is necessarily erroneous. A finding of unlawfulness of future rates does not by itself compel a similar conclusion as to past rates.

It is true that as to past years the long-haul freight originating and largely "car owner" roads had the burden of proving that existing AAR rates were just and reasonable. And it is true that in this they failed, for the Commission has now held that those rates were not just and reasonable. But it does not follow that the predominently freight car owner group is somehow obliged to produce line-haul mileage figures for the past from non-existent records. The law does not demand the impossible. It was within the Commission's discretionary power to fix past rates on a straight time basis, as they had been fixed for decades by the railroads themselves, rather than to add a line-haul use factor which could not be based upon data but could rest only upon surmise.

The B&M and the NH point out that the Commission did not find that the amounts they had chosen to pay for car use in the past were outside the zone of reasonableness and contend that in the absence of such finding they cannot be compelled to pay higher rates even though such higher rates are also within the zone of reasonableness. We disagree.

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[4] The B&M's one attempt to change an AAR billing rate, that for replacing roller bearings, was successful.

In fixing specific rates for past years the Commission was speaking directly to the United States District Court for the Southern District of New York and the Supreme Court of the State of New York for New York County. In each court claims by other railroads against B&M and NH for money due for use of freight cars had been partially settled by entry of judgment on the issue of liability against B&M or NH, but entry of final judgment had been deferred until the Commission determined pursuant to a reference the reasonable rate of compensation for the use of freight cars.[5] In answering the references the Commission properly was not concerned with any possibly proper or reasonable zone or range of rates but only with a specific rate upon which awards for past use should be based. Furthermore by finding that specific rates would be "the just, fair, reasonable and non-discriminatory rates", the Commission indicated that any other rates would not meet that standard.

There was no error in the Commission's use of Account No. 53, Index of Freight Car Costs, as a guide for calculating loss of purchasing power by reason of inflation. Indeed it seems to us more appropriate to use freight car construction cost alone as the guide to rising car costs than general costs reflected in the Wholesale Price Index of the Bureau of Labor Statistics, which reflect price increases in general, as the B&M and NH urge.

We also reject the contention of the B&M and NH that the Commission erred in approving a system of car hire

[5] The cases pending in the U. S. District Court are reported in *Baltimore and Ohio Railroad Co.* v. *New York, New Haven and Hartford Railroad Co.*, 196 F. Supp. 724 (S. D. N. Y., 1961). The cases pending in the Supreme Court of New York for New York County are *Boston and Maine Railroad* v. *Illinois Central Railroad*, index No. 115/59, and *New York, New Haven and Hartford Railroad Company* v. *Illinois Central Railroad*, index No. 70/63.

charges for the future based upon the assumption that repair cost and car utilization are the same for all cars regardless of age and value. Their argument is that older cars require more repair than newer ones and that the more modern cars are used in preference to older ones and therefore have a different utilization ratio which ought to be considered in fixing *per diem* rates.[6] We see no reversible error in the Commission's disposition of this contention as follows:

> "It cannot be found on this record, however, that any measurable progression in repair costs exists in relation to either the age or depreciated value of the car. Nor can it be found that the difference, if any, between the average repair cost and the actual repair cost of new or old cars, is so great as to make unreasonable the results reached by use of the average. We would not be warranted in disapproving rates varying with car cost merely because of the asserted possible differences in utilization and repair costs. If future studies demonstrate that measurable and significant differences exist, they should be brought to the attention of the Commission."

It is not the function of this court to reevaluate the record or to substitute its judgment for that of the Commission. The adequacy of the evidence to support the contention of the B&M and NH is for the Commission. Anyway the door is not closed to the reception of further data.

The B&M and NH also complain of the Commission's use of average costs of all freight car owners instead of

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[6] For explanation of car utilization ratio and "car day divisor" see the former opinion of this court. 162 F. Supp. 289, 296 (1958).

the specific costs of each separate owner and they say that if it was proper for the Commission to use average costs then the Commission should also have used averages in constructing a line-haul mileage charge for past years. We see no merit in either assertion of error.

Certainly separate cost figures for each freight car owning railroad would vastly complicate record keeping and the computation of car hire rates. Nor does it appear that averaging car owner costs would work any gross unfairness. Costs are not so dissimilar that use of an average figure would work any great injustice. Averaging foreign line-haul car mileage, however, is quite another matter. Studies conducted by the Commission of the year 1960 show that the average distances foreign *per diem* cars moved that year varied from an average daily mileage of 4.8 miles on the Long Island Rail Road to a daily average of 120.9 miles on the Union Pacific. On the basis of these figures for 1960 it seems obvious that an average figure for line-haul mileage would not be fair or just. It is for the Commission to decide when to resort to averages and when not to. We see no abuse of discretion in the Commission's use of average freight car costs but not average line-haul mileage on foreign lines.

Other assertions of the Commission's error are either disposed of by what we have already said, or were abandoned on oral argument, or are too insubstantial to warrant discussion or even enumeration.

In conclusion it will suffice to say that in our view the Commission has dealt thoroughly with a highly complex problem and after full and painstaking study has come up with a rational and fair solution as simple and convenient as the intricacy of the problem permits.

Judgment will be entered dismissing the complaints.

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# UNITED STATES DISTRICT COURT

District of Massachusetts

Civil Action No. 56-1004-G

Boston and Maine Railroad, et al

v.

United States of America and Interstate Commerce Commission

AND

Civil Action No. 68-79-G

Boston and Maine Corporation

v.

United States of America and Interstate Commerce Commission

## JUDGMENT

Woodbury, Sr. J., Wyzanski, Ch.J., and Garrity, D.J.

In accordance with the Opinion of the Court dated March 18, 1969, it is hereby Ordered

Judgment for the Defendants; Complaints dismissed.

Dated at Boston, Massachusetts, this 20th day of March, 1969.

Peter Woodbury
Charles E. Wyzanski, Jr.
W. Arthur Garrity, Jr.

By the Court,
Kathleen M. Dolan
Deputy Clerk

## APPENDIX G

## INTERSTATE COMMERCE COMMISSION

Service Date
September 14, 1962

No. 31358

CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL.

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. ET AL.

No. 33145

RAILROAD FREIGHT CAR PER DIEM CHARGES

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Decided September 5, 1962

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On reconsideration, reassignment of the proceedings herein to a hearing examiner for hearing and the recommendation of an appropriate order thereon, accompanied by the reasons therefor, in lieu of a hearing examiner found to have voluntarily withdrawn from the previous assignment thereof to him for such purposes, affirmed.

Appearance as shown in prior report in No. 31358, and in addition:

*Reginald Ames, Kenneth H. Ekin, A. Paul Funkhouser, Joseph L. Lenihan, Charles M. Little, Edward M. Reidy, E. L. Ryan, Jr., T. J. Slattery,* and *Claude R. Wilson, Jr.,* for complainants.

*Richard E. Costello* and *Rowland Posey* for interveners in support of complainants.

*William T. Griffin, Neal Holland,* and *Peter Benton Spruance* for defendants.

Appearances in No. 33145:

*Reginald Ames, J. T. Clark, L. W. Hobbs, Martin J. Keating, Gordon E. Neuenschwander, W. H. Parsons, Leo H. Pou, John F. Reilly, E. L. Ryan, Jr., T. J. Slattery, Richard H. Strodel,* and *Ross L. Thorfinnson* for respondents.

## REPORT OF THE COMMISSION ON RECONSIDERATION OF CERTAIN ORDERS

Involved in No. 31358 is the matter of determining the lawful rate of per diem or compensation to be paid by certain nonowning railroads for the use on their lines of freight cars owned by other railroads during the period from August 1953, to the present. The Commission made a declaratory determination thereof in that proceeding, 297 I. C. C. 291, which became the subject of a suit by the petitioners in a Federal court in Massachusetts entitled *Boston & Maine Railroad* v. *United States,* 162 F. Supp. 289 (D. Mass.), appeal dismissed *per curiam,* 358 U. S. 68 (1958), challenging certain aspects of that determination. Upon remand by the courts to the Commission, the proceeding was reopened for further hearing by order entered March 24, 1959.

By order of July 24, 1959, in No. 33145, the Commission, among other things, initiated an investigation under section 1(14)(a) of the Interstate Commerce Act for the purpose of esablishing reasonable rates, regulations, and practices for the determination of the compensation to be paid for the use by one carrier of freight cars owned by another carrier, and ordered that both of these proceedings be heard on a consolidated record at a time and place to be fixed. All rail carriers subject to part I of the Act were made respondents. Both proceedings were assigned to Hearing Examiner Rene J. Mittelbronn for hearing and the recommendation of appropriate orders accompanied by the reasons therefore. On June 1 and September 29, 1959, he presided at and made a report upon matters considered at a pre-

hearing conference held for the purpose of determining special procedure to be pursued in the disposition of the proceedings.

Thereafter, and before any evidence was adduced, Mr. Mittelbronn at his own request was relieved of his assignment to the proceedings, as set forth in the order of Chairman Winchell dated February 15, 1960. Hearing Examiner Walter L. Baumgartner subsequently was assigned to the proceedings.

By petitions, dated February 6, 1960 and April 15, 1960, the defendants in No. 31358,[1] who are also among the numerous respondents in No. 33145, requested reconsideration and vacation or modification of the orders relating to the change in examiner assignments,[2] and, ancillary thereto,

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[1] Hereinafter, where appropriate, the defendants will be referred to either as petitioners or defendants, depending upon the context.

[2] Three orders are here involved; one dated January 7, 1960 and two others, each dated February 15, 1960. The order of January 7, 1960 was confined to the grant in part of the petitions of defendants-respondents dated December 15 and 24, 1959 with respect to the inclusion of additional questionnaire forms within the scope of the orders of November 25, 1959, and the service of the orders upon certain respondents in No. 33145 not theretofore served. Reconsideration and modification of that order is now sought by the defendants in their petition dated February 6, 1960, under consideration herein, so as to effect reinstatement of the assignment of both proceedings to Examiner Mittelbronn for hearing and the recommendation of appropriate orders, etc. Such relief had been sought in the petitions of December 15, 24, 1959. The two orders of February 15, 1960 disposed of those requests: one, issued by Division 3 of the Commission (subsequently corrected), denying the petitions insofar as they requested the reassignment to Examiner Mittelbronn of the proceedings for hearing and the recommendation of appropriate orders, etc. The other, issued by Commission Chairman Winchell, recited the voluntary withdrawal of that Examiner from, and rescinded, his previous assignment, and referred the proceedings to Examiner Baumgartner for hearing and the recommendation of appropriate orders, etc. Reconsideration and modification of these two orders are now sought by defendants in the petitions above mentioned.

hearing and oral argument, the issuance of subpoenas or orders of equivalent effect to certain Commission personnel to aid in the adduction of facts pertinent to the relief sought, the provision of certified copies of a list of hearing examiners available for assignment to the proceedings as of September 1959, and other documents pertaining to the assignment of hearing examiners named on the list between September 1959, and February 1960. The complainants and their supporting interveners in No. 31358 requested only that the Commission take such corrective procedural steps as may be determined by the Commission's General Counsel to be necessary to insure that the proceedings were free of any procedural irregularity claimed in the petitions. They offered also to stipulate the acceptance of the assignment of Examiner Baumgartner without challenge. The offer was rejected by petitioners for the assigned reason that "basic jurisdictional defects" may not be waived.

The petitioners maintain that Examiner Mittelbronn's withdrawal from the assignment was ineffective because under section 7 of the Administrative Procedure Act (hereinafter referred to as the A. P. Act) 5 U. S. C. A. 1006, the examiner could not withdraw from his duties and responsibilities as such, except by filing an affidavit of personal bias or disqualification, which was not done, and that his personal wishes are not a controlling factor. Section 7(a) of the A. P. Act provides in pertinent part as follows:

> * * * The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

This section provides that a hearing examiner may withdraw from a proceeding if he "deems himself disqualified." It also provides that if one of the parties files an affidavit of bias or disqualification of such officer, the agency shall "determine the matter as a part of the record and decision in the case."

There is nothing in the record to indicate that Mr. Mittelbronn deemed himself disqualified. Likewise, no question of bias or disqualification of Mr. Mittelbronn has been raised by affidavit or otherwise, such as is contemplated in the last portion of this section.

Accordingly, section 7(a) is not applicable here. This section, however, does not prevent an agency from relieving a hearing examiner from an assignment upon his request, for such reasons as the agency considers adequate. The action here was simply one of internal procedure and management, consistent with this Commission's inherent powers and duties. Thus, in relieving Mr. Mittelbronn, and assigning Mr. Baumgartner to these proceedings, there was no violation of section 7(a) as alleged.

No hearing had been held and no evidence had been received prior to the relief of Mr. Mittelbronn from his assignment. He had only participated in two prehearing conferences held on June 1, 1959 and September 29, 1959, at which the parties to the proceedings had agreed upon procedure for the future conduct of hearings as set forth in the statement issued by Mr. Mittelbronn on October 5, 1959, entitled "Reporting Action at Prehearing Conferences and Directing Future Procedure", which was made a part of the record. Mr. Mittlebronn was permitted at this stage of the proceedings to withdraw on his own volition, as heretofore stated. Hearing in the proceedings will be conducted by Hearing Examiner Baumgartner, to whom they have been assigned.

In the administration of proceedings involving hearings, it often becomes necessary to relieve an examiner of an assignment made in the preparation of an itinerary because the hearing is thereafter postponed, or because of his illness or the overrunning of a hearing into the time fixed for the next hearing on the examiner's schedule, or because of other unforeseen exigencies beyond the control of either the examiner or the Commission. In our opinion, an examiner may also be relieved of an assignment by mutual agreement between him and the Commission. These views are based upon the necessities attendant upon the proper, efficient, and economical administration of the Commission's functions and the relationship of the examiner as an employee of the Commission. It is hardly necessary to point out, however, that any manipulation of assignments designed to interfere with, or having the effect of interfering with or influencing, the independence of the examiner in the performance of his duties or the exercise of his discretion as a hearing officer, would run counter to the spirit and purpose of the A. P. Act.

In any event, since Mr. Mittlebronn had not presided at the taking of any oral evidence (See Sec. 8(a) of the A. P. Act, 5 USCA 1007(a)), the matter is not open to question by any party. The extent of his participation was to hold two pre-hearing conferences. These dealt solely with procedural matters. He had not presided "at the reception of evidence" in these proceedings, and thus was not required to make the "recommended decision or initial decision" contemplated in section 5(c) of the A. P. Act (5 U. S. C. 1004(c)). The petitioners' claim of violation of their rights to procedural due process of law under the Fifth Amendment to the Constitution fails to specify any matters of fact to establish such a violation or to point to any palpable injury or prejudice caused thereby.

In oblique fashion, petitioners suggest irregularity in the intimated failure to assign these proceedings to a

successor examiner in rotation, as required by section 11 of the A. P. Act (5 USCA 1010). That section provides for the manner of appointment of competent hearing examiners by the agency, "who shall be assigned to cases in rotation so far as practicable." The Commission has long since concluded that the assignment of cases to hearing examiners in strict rotation is impracticable; indeed, impossible, if economy, and efficiency in administration are to be achieved. In general itineraries of cases are assigned to examiners by rotation. For reasons of economy, instead of assigning cases ripe for hearing in a compact geographical area in rotation to as many examiners as there are cases, all are usually assigned to one examiner on one itinerary. Moreover, the assignment of cases requiring special or unusual skill or knowledge of particular subject matters to examiners having such skill or knowledge,[3] and the unavailability of examiners next in rotation because of their absence on account of illnes or other disability, or on annual leave, or because of their respective work loads on hand, all conspire against efforts at strict rotation. Assignment out of rotation in accordance with itinerary requirements for reasons of economy was sanctioned in *Tractor Training Service* v. *F. T. C.*, 227 F. 2d 420, 423 (9th Cir. 1955). In a footnote, the court cited this Commission as one of four agencies in addition to the Federal Trade Commission which deviate from the rotation requirement.

The petitioners also contend that Examiner Mittelbronn's withdrawal was ineffective because it was based upon omis-

[3] While the requirements for rotation are designed to prevent an agency from disfavoring an examiner by rendering him inactive, "examiners may be permitted to specialize and be assigned mainly to cases for which they have so qualified." Senate Doc. No. 248, 79th Cong., 2nd Sess., pp. 215, 280. Also see *Ramspeck* v. *Trial Examiners Conference*, 345 U. S. 128 (1953).

sions [4] from the orders accompanying the questionnaires which were subsequently corrected by order of Division 2 on January 7, 1960, and because the request for withdrawal was made not to the Commission, but to the Director of the Bureau of Rates and Practices. With respect to the former, such a circumstance does not negative the action taken upon the request for withdrawal as heretofore stated, and concerning the latter, the reassignment order of the Chairman, on its face, shows that the matter reached the attention of the Commission, and the question of an intermediary is of no consequence. In view of the previous discussion, no further elaboration on these contentions is deemed necessary.

For the foregoing reasons, we find and conclude that the grant of relief sought in the petitions for reconsideration and modification of the orders here in issue is not warranted in law or in fact. The request for oral argument is denied because petitioners' contentions are adequately presented in their petitions, and such argument would not contribute to a better understanding of their position. The request for hearing and subpoenas or equivalent orders is denied because the basic allegations of fact appearing in the petitions, if proved, are insufficient to establish the claim for the relief sought.

An order will be entered denying the petitions in all respects save as to ancillary requests therein previously granted.

COMMISSIONER WEBB did not participate.

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[4] The alleged omissions consisted of (1) the failure of the Commission to order or provide for the service upon the parties to the proceedings, other than class I carriers, of an order issued November 25, 1959, by Division 2, *supra*, requiring class I carriers to submit the information called for in questionnaire forms attached to the order, and (2) the failure to include within the scope, or to attach to that or another order of the same date, directed to carriers of classes I and II certain questionnaire forms designed to elicit specified information from such carriers. The issuance of such forms had been tentatively agreed upon by representatives of the parties and the Commission at a prehearing conference held before Examiner Mittelbronn on September 29, 1959.

# ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 5th day of September, A. D. 1962.

No. 31358

CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL.

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. ET AL.

No. 33145

RAILROAD FREIGHT CAR PER DIEM CHARGES

*It appearing* That upon consideration of the records in the above-entitled proceedings, the petitions by the defendants-respondents, dated February 6, 1960 and April 15, 1960, for reconsideration and modification of the order of the Commission entered on January 7, 1960, and two orders therein each entered on February 15, 1960, and the complainants-respondents' reply to said petitions and, being fully advised in the premises, the Commission, on the date hereof, has made and filed its report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof:

*It is ordered,* That the said petitions and ancillary requests therein made, except such requests as have heretofore been granted, be, and they are hereby, denied.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

# APPENDIX H

## Statutes Involved

***Administrative Procedure Act:***

DEFINITIONS

5 U. S. C. §551(4)-(7)

For the purpose of this subchapter—

* * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

* * *

## Rule Making

5 U. S. C. §553(d)

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

## Adjudications

5 U. S. C. §554(d)

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency

review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

HEARINGS, PRESIDING EMPLOYEES . . . EVIDENCE . . .

5 U. S. C. §556(b), (d)

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating em-

ployee, the agency shall determine the matter as a part of the record and decision in the case.

* * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party, and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

APPOINTMENT OF HEARING EXAMINERS

5 U. S. C. §3105

Each agency shall appoint as many hearing examiners as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Hearing examiners shall be assigned to cases in rotation so far as practical, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners.

***Interstate Commerce Act:***

SEC. 1, pars. 4, 10, 11, 14(a). [*49 U. S. C. §1(4), (10)-(11), (14)(a).*]

(4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon

reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(10) The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

* * *

(14)(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad

subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

SEC. 13(1) [*49 U. S. C. §13(1).*]

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omited to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Com-

mission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

SEC. 15(2) [*49 U. S. C. §15(2).*]

(2) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

SEC. 16(1) [*49 U. S. C. §16(1).*]

(1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

PREME COURT, U. S.

FILED
OCT 24 1969
JOHN F. DAVIS, CLERK

Nos. 313, 180, 197

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

BOSTON AND MAINE RAILROAD, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*,

and

BOSTON AND MAINE CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*,

AMERICA CORPORATION COMMISSION, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*,

UNION PACIFIC RAILROAD COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

On Appeal from the United States District Court for the District of Massachusetts and the United States District Court for the District of Nebraska

## MOTION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., TO AFFIRM

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October 1969

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 343, 480, 497

BOSTON AND MAINE RAILROAD, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*,

and

BOSTON AND MAINE CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

ARIZONA CORPORATION COMMISSION, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

UNION PACIFIC RAILROAD COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

**On Appeal from the United States District Court for the District of Massachusetts and the United States District Court for the District of Nebraska**

## MOTION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL. TO AFFIRM

Pursuant to Rule 16(1)(e) of the Rules of this Court appellees Chicago and North Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Rail-

road Company, Lehigh Valley Railroad Company, Penn Central Transportation Company, The Pittsburgh & Lake Erie Railroad Company and Southern Railway System move that the judgments of the district courts in these cases be affirmed on the ground that the questions presented are so lacking in substance as not to warrant further briefing or oral argument.

## STATEMENT

### I. The Background of the Litigation

These are appeals from the judgments of two district courts that sustained an order of the Interstate Commerce Commission dealing with the amount of the charges to be paid by railroads for their use of one another's freight cars. *Chicago, B & Q.R.R. v. New York, S. & Western R.R.*, 332 I.C.C. 176 (1968).[1] These appeals are the latest stage in a controversy that has embroiled the railroads of the United States for more than 20 years and given rise to protracted litigation before the Interstate Commerce Commission and the courts. The proceedings that culminated in the Commission's order began in 1953.

The interchange of freight cars among the railroads of the United States is both a practical necessity and a legal obligation under the Interstate Commerce Act. As an incident to through movements of freight, almost every railroad in the country both owns freight cars that are sometimes on the lines of other railroads

[1] The Commission's report and order are reproduced in Appendix E to the Jurisdictional Statement in No. 343 and Appendix E of the Joint Appendix to the Jurisdictional Statements in Nos. 480 and 497. Citations herein will be to the appropriate pages of Volume 332 of the I.C.C. reports; there is parallel pagination in both appendices.

and uses on its lines cars of other railroads.[2] Arrangements for determining the amounts that railroads will pay for the use of freight cars owned by other railroads are therefore necessary. For more than 50 years these amounts—which are often called "per diem" payments[3]—were established by agreement among the railroads under the sponsorship of and in accordance with procedures adopted by industry associations.[4] In 1949 the procedures for establishing per diem charges were embodied in an agreement among the members of the Association of American Railroads that the Commission approved, subject to certain conditions, pursuant to Section 5a of the Interstate Commerce Act. *Association of American Railroads—Agreement*, 277 I.C.C. 413 (1950).

From 1920 until approximately the end of the second World War the per diem charge was fixed at $1 a day. Beginning in 1945 because of increasing costs the rate was steadily increased. Between 1945 and 1959 the rate rose by stages from $1 a day to $2.88 a day. The $2.88 rate prevailed until 1964 when a multi-level system of rates varying according to the age and cost of cars was instituted.

As a result of the increases in the post-war period a controversy developed among the railroads over the

[2] These railroad appellees are important car owners as well as users. On March 31, 1964, which is the last date of record, these appellees together owned 109,662 per diem freight cars, 26.4% of the total of such cars owned by Class I railroads. (Exhibit R-181).

[3] The use of the term "per diem" arose because beginning in 1902 the charges were calculated solely on the basis of the time a car was on the line of the using railroad. The charges are sometimes referred to as "car hire" rates. The two terms will be used interchangeably herein.

[4] Since 1934, the Association of American Railroads; prior to that year, certain predecessor organizations.

level of the per diem charges. While many of the roads accepted as satisfactory the per diem charges established pursuant to the industry arrangement, others took the position that the charges were too high, while still others, notably certain western carriers that are now appellants in No. 194, maintained that they were too low. For many years the appellants in No. 343 have contended that the AAR rates have been and are too high.

Until 1951 all railroads, including the few that were not signatories of the industry agreement, made per diem payments on the basis established by that agreement. In that year one railroad that was not a party to the agreement and is not now involved in the litigation announced that it would no longer pay the established per diem rate, but would settle its accounts at a lower rate that it tendered to other railroads. In 1953 the Boston & Maine Railroad, the New York, New Haven & Hartford Railroad and certain other lines that are among the appellants in No. 343 withdrew from the agreement and announced that they would no longer pay the rate established pursuant to the agreement but would settle per diem accounts at a lower rate which they proposed to other carriers. The carriers

6

This difference is cited in the District Court opinion in the instant T. & N. Ry. v. Gordon, 116 F. Supp. 113, 115 (1953). In July 1954 a number of railroads complained to the Commission that the per diem rates were unjust and unreasonable to the extent that they exceeded certain rates. The latter railroads, including the appellants in No. 194, contended that the per diem rate was inconsistent with the requirements of section 1 (14) (a) of the Interstate Commerce Act that per diem rates be reasonable, equal and non-discriminatory. After a hearing the Commission found that the per diem charges were not shown to have been or to be unreasonable per se and that the investment per diem rate was not shown to be unreasonably low and denied the complaints. 11 I.C.C. 101.

## II. The Early Stages of This Proceeding

sation "for present use." It also found that lower charges would not be compensatory either for the present or for the past. *Chicago, B. & Q. R. R. v. New York, N. H. & Western R. R.*, 297 I. C. C. 294, 308 (1955).

In November 1956, after a denial of rehearing by the Commission, a number of railroads, including the present appellant in No. 111, brought suit in the District Court for the District of Massachusetts attacking the Commission's order. They contended, among other things, that the Commission had no authority to issue a declaratory order dealing with the legality of per diem payments for past periods. The district court rejected that contention but set aside the Commission's order on other grounds. *Boston & Me. R. R. v. United States*, 162 F. Supp. 280 (D. Mass. 1958). The district court "based its decision on the Commission's summary rejection of an alternative method of computation which would introduce a mileage factor into the *per diem*, advocated by certain of the terminal roads." *Boston & Me. R. R. v. United States*, 356 U. S. 38, 39; see 162 F. Supp. at 297-98. In addition, the district court, for the guidance of the Commission on remand, pointed out certain errors that it believed the Commission had made in considering some of the components of costs that enter into the determination of a proper car hire charge. 162 F. Supp. at 295-97. Cross appeals were taken to this Court. The plaintiff railroads appealed on the ground that the district court erroneously rejected their contention that the Commission had no authority to issue a declaratory order with respect to the legality of per diem payments for past periods. On this Court the Commission urged

The Commission's report is reproduced in Appendix B to the Jurisdictional Statement in No. 111.

noted that it was proposed to proceed in accordance with the terms of the district court's remand, and on that basis the Court dismissed both appeals. *Boston & Me. R.R. v. United States*, 398 U.S. 68, 71-72.

Pursuant to the remand the Commission on March 24, 1969, re-opened the original proceeding for further hearings. On July 24, 1969, the Commission expanded the scope of the original proceeding by initiating another proceeding, ID 5ubNo. 293(5), in which it took two steps: it exercised its authority under Section 20 of the Act to require detailed reports from all railroads to facilitate a more accurate computation of per diem charges; and it instituted an investigation under Section 15 (1) (a) to ascertain whether there was a need to establish reasonable rules, regulations and practices governing the determination of car hire rates for all railroads in the future. All rail carriers subject to Part I of the Interstate Commerce Act were made parties, and the new proceeding was consolidated with the previously completed proceeding that had been remanded.

The Commission directed its Cost Section to secure and develop pertinent cost data, including cost allocations on a time and mileage basis. The problems of developing car costs on a particularized basis and allocating those costs partly on a time factor and partly on a mileage factor were formidable. It required three years for the Commission's Cost Section, with the cooperation of the railroads, to complete its cost study and propose a proposed formula for computing car hire charges for the future.

The cost study became the principal subject matter of the hearings in the consolidated proceedings, which

began in January 1963 and extended into 1964.[5] There were more than 50 days of hearings, and the record included more than 10,000 pages of transcript and approximately 100 exhibits. The examiner issued a detailed and voluminous recommended report and order in December 1965.[6] Thereafter the case was briefed before the full Commission, which on January 30, 1968, issued the report and order here involved.

An understanding of certain events outside the per diem proceedings that occurred after the district court's remand is necessary to an understanding of the Commission's final election in the reopened and consolidated proceedings.

### III. The Related Litigation Over Per Diem Charges in the Past

The question of the Commission's authority to issue a declaratory order with respect to the legality of per diem payments for the past was not finally determined on review of the Commission's first order. This Court dismissed the appeal of the plaintiff railroads without prejudice to review of that issue "if it survives the further Commission proceedings." 385 U.S. at 72. The railroads that had sought declaratory relief from the Commission recognized that if it were ultimately determined that the Commission had no authority to grant that relief they would be remitted to whatever rights they might have on the basis of contract or quantum meruit. To protect these rights, numerous railroads in 1959 brought 109 separate suits in the

[5] In the course of the hearings the Southern Railway System filed a complaint against the existing multi-level per diem rates (Docket 34036). It was consolidated with the other per diem proceedings.

[6] Appendix D to the Jurisdictional Statement in No. 110.

District Court for the Southern District of New York against the Boston & Maine and the New Haven to recover, either on contract or quantum meruit, per diem balances determined on the basis of the rates established for past periods pursuant to the industry agreement.[6] The two defendants answered by alleging, among other things, that the established per diem rates were unreasonably high, and they counterclaimed for the difference between any amounts they had actually paid and any lesser amounts that might be found reasonable.

In July 1961 the district court held that the plaintiffs were entitled to a partial interlocutory summary judgment that would adjudge that the plaintiffs were entitled "to recover from defendants per diem rates in such amounts as are to be ultimately determined to be due them by this Court based upon a rate fixed by the Commission and the Court or by the Court alone." *Baltimore & O.R.R. v. New York, N.H. & H.R.R.*, 196 F. Supp. 724, 749 (S.D.N.Y. 1961). On June 15, 1962, the district court entered a judgment in conformity with its opinion, which is reproduced in its entirety as an appendix to this motion, *infra*.[7] The judgment directed the plaintiffs

[6] The suits sought recovery for a period beginning August 1, 1956.

[7] The district court's judgment provided that the plaintiffs shall have partial judgments in their favor as to the liability of the defendants to said plaintiffs for the certain offs of the grams and adjudging that those plaintiffs are entitled to recover from defendants per diem in such amounts as are found by this Court to be due them based upon a rate to be fixed just, fair, reasonable and remunerative contained in the Interstate Commerce Commission, of which said Commission shall advise this Court and thereafter to be ultimately determined and fixed by this Court, for each month beginning with August 1956 to date. [illegible] See p. 30 *infra*.

that were complainants in the proceeding before the Commission to amend their pleadings to request the Commission "without regard to the proceeding pending in Docket No. 33145 to advise this Court what *per diem* rate was just, fair, reasonable and non-discriminatory for each month beginning with August 1953 to date; . . ." The order also directed any plaintiffs that were not parties to the proceeding before the Commission to petition the Commission for leave to intervene for the purpose of making the same request. The plaintiff railroads complied with these directions, and in December 1962 the Commission permitted the requested amendments and interventions.

A similar situation arose in litigation in the New York Supreme Court, New York County, involving the Illinois Central Company. There the Boston & Maine and the New Haven each sued the Illinois Central in 1959 for interline freight balances, and the Illinois Central counterclaimed for per diem balances on the basis of the rates established under the mileage agreement. The state court denied a Boston & Maine motion to dismiss the counterclaim and for summary judgment and deferred ruling on the counterclaim to await advice from the Commission as to what per diem rates would be lawful for the period involved. (See 332 I.C.C. at 181-82.)

[illegible] Subsequently the Boston & Maine invoked its mandatory arbitration rules of the Association of American Railroads and in the arbitration obtained an award holding that under the accounting rules of the AAR it was necessary to set off the Illinois per diem balances against the interline freight balances. This award was upheld. Boston & Maine Corp. v. Illinois Central R.R. Co., [illegible] N.Y. [illegible]

## IV. The 1966 Amendment of Section 1(14)(a) of the Interstate Commerce Act and the Action Taken by the Commission Thereunder

Prior to 1966 the Commission was authorized by Section 1(14)(a) to prescribe compensation to be paid by one railroad for the use of the freight car of another solely on the basis of the elements of ownership expense, including, among other things, maintenance costs, depreciation, taxes and a fair return on value. Thus, in fixing per diem rates the Commission was not authorized to add to the costs of ownership any amount designed to operate as an incentive to car ownership or to achieve any other similar collateral regulatory purpose. *Palmer v. United States*, 75 F. Supp. 63 (D.D.C. 1947); *Boston & Me. R.R. v. United States*, 162 F. Supp. 289, 295 (D. Mass. 1958), *appeal dismissed*, 358 U.S. 68.[9]

On May 26, 1966, Congress amended Section 1(14)(a) in a way that expanded the authority of the Commission under the section. The amendment provided in substance that the Commission, in exercising its authority to fix compensation to be paid for the use of "any type of freight car," should give consideration to the national level of ownership of the type of freight car involved and to other factors affecting the adequacy of the national freight car supply and, on the basis of that consideration, determine whether the charges should be computed solely on the basis of elements of ownership expense or should be increased by an incentive element. (See pp. 20-27, *infra*.)

[9] See the definition of "per diem" in *Virginia Blue Ridge Ry. v. Southern Ry.*, 96 I.C.C. 501, 512-513, quoted with approval in *Chicago R.I. & P. Ry. v. United States*, 284 U.S. 80, 97.

The Commission acted promptly to exercise the authority conferred upon it by the amendment. On June 23, 1966, less than a month after the enactment of the amendment and well in advance of the date on which it was to become effective (September 1, 1966), the Commission initiated a proceeding designated as Ex Parte No. 253, *Incentive Per Diem Charges*.[1] The purpose of this proceeding was to enable the Commission to determine "whether information presently available warranted the establishment of an incentive element increase, or an interim basis, to apply pending further study and investigation." 332 I.C.C. at 12. All common carriers by railroad subject to the Interstate Commerce Act were made parties to the proceeding, and hearings were held in November and December 1966 and April 1967. In that proceeding a number of the appellants in No. 197 took the position that the Commission should establish basic per diem rates based on the cost of ownership before determining whether the basic rate should be increased by some incentive element. (See p. 25 n. 23, *infra*.)

On October 26, 1967, the Commission issued its report in *Incentive Per Diem Charges*, 332 I.C.C. 11. In that report the Commission found:

> "Despite participation by 189 of the Nation's railroads, the most thorough presentation of information and argument ever made to this Commission, and the most exhaustive efforts by the parties to meet the statutory standard, we conclude that the information necessary to this decision is not presently available." *Id.* at 16.

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[1] On June 20, 1966, section 4(3) of the Interstate Commerce Act was amended to permit the Commission to depart from the mileage basis of per diem charges in order to encourage economy and efficiency in the use of railroad cars. The Commission found that authorization was to be used

The Commission also stated:

> "We find, upon consideration of the record herein, after collecting the oral and advice of all railroads subject to our jurisdiction, and of other interested parties, that there is not available at this time reliable factual data which would enable this Commission to comply with the statutory requirements and make a valid decision as to the imposition of an incentive charge." *Id.* at 18.

On the basis of these findings the Commission concluded that no incentive per diem charge should be imposed at that time but that a further investigation should be conducted and further proceedings held with regard to the question of an incentive per diem charge. Judicial review of the Commission's action was not sought. On December 23, 1967, the Commission instituted another proceeding designated as Ex Parte No. 252, Sub. No. 1, *Incentive Per Diem Charges—1968*, for the purpose of determining whether an incentive per diem charge should be imposed. That proceeding is still pending.

## V. The Commission's Report and Order

In its report in the per diem case the Commission reviewed and analyzed the evidence in detail and made findings on all of the material issues raised by the parties. In its review of the evidence and in its findings the Commission took full account of the criticisms made by the district court on review of its prior order relating to such matters as depreciation, car repair costs and the proper "car day divisor." On the basis of its findings the Commission made determinations with respect to car hire charges, both for the future and for the past.

For the future the Commission exercised its powers under Section 1(11)(a) and prescribed a method of calculating car hire charges that would be just and reasonable. 332 I.C.C. at 230-31.[9] In doing so the Commission departed from a straight time charge and introduced a mileage element, finding that "reasonable compensation to car owners requires that all ownership costs be distributed among and borne equitably among all railroads making use of such cars in just proportion to the amount of use, that the use

[9] The method is to be applied on and after the effective date of the Commission's order, which was originally fixed as October 1, 1969. Thereafter the Commission extended the effective date to November 15, 1969. After the District Court for the District of Nebraska granted a preliminary injunction pending review of the order, the Commission postponed the effective date until further order. After the Nebraska court upheld the Commission's order the order was reinstated, effective August 1, 1969. The Nebraska court has stayed this order pending this appeal but excepted from its stay that part of the Commission's order that required the railroads to maintain both time and mileage records for the use of each other's cars after August 1, 1969, so that adjustments of car hire payments from that date might be made if its decision is affirmed by this court.

made of cars must be measured by both the length of time cars are held and the amount of activity to which they are subjected, and that the most practicable and reliable method of measuring car activity is the line-haul mileage over which they are moved." *Id.* at 26 (paragraph 6).

In making its determination relating to per diem charges for the past, the Commission recognized that it was not exercising an independent regulatory power to prescribe rail line charges, but instead was responding to the request for advice that it had received from the District Court for the Southern District of New York, and that its determinations would be germane and only as aid and [illegible] that court and to the New York state court in determining the amounts recoverable in the litigation pending in those courts. 1981 I.C.C. at 185, 186.

With respect to post per diem rates, the Commission made the following findings: (1) it found that the per diem rates established pursuant to the industry agreement from and after August 1, 1964, had not been shown to be lawful; (2) it stated a specific per diem rate for each year from 1964 through 1965 that it found would be reasonable and otherwise lawful for the purpose of setting per diem

balances between the parties to the pending litigation [18] (*id.* at 256, 257); and (3) it determined that for any year after 1965, and until the effective date of the rates prescribed for the future, lawful per diem rates, for the purpose of settling such per diem balances, would be those ascertained by the methods employed by the Commission to calculate the per diem rates found reasonable for prior years (*id.* at 257-58).

### VI. The Proceedings in the Courts Below

Two different groups of plaintiffs brought actions attacking the Commission's order of January 17, 1968, in two different jurisdictions—the District Court for the District of Massachusetts, which had reviewed the first order of the Commission, and the District Court for the District of Nebraska.

The action in the District of Massachusetts was brought by the Boston & Maine, the New Haven, the Long Island Railroad and certain terminal and switching railroads (the Massachusetts appellants). The basic contention of those railroads was that both the per diem rates determined by the Commission to be reasonable for the past and those it prescribed as reasonable for the future are too high. They did not raise in the Massachusetts court, as they seek to do

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[18] In determining these rates the Commission found that the record did not contain evidence that would enable it to make any reliable estimate as to the distribution of costs between time and mileage in the past. In its computation of these charges it therefore did not use any mileage element. (See pp. 38-39, *infra*).

The rates determined by the Commission to be lawful for the past periods were lower than the rates established under the industry agreement for those periods but generally higher than the rates that the dissident railroads had indicated they would be willing to pay.

here, the question whether the Commission was authorized to respond to the request of the District Court for the Southern District of New York for advice concerning lawful per diem rates for past periods of time. (See pp. 31-35, *infra.*) Their attack was directed against the Commission's findings on a number of issues involved in its determination of the costs of car ownership. Their arguments, which are discussed at pages 35-45 below, included, among other things, charges that the Commission had erred in its treatment of the so-called car repair deficiency, in failing to include a mileage element in determining per diem rates for the past, and in measuring the effect of inflation on costs by an index of freight car costs instead of a general wholesale price index. The district court, which included the two judges who had joined in setting aside the Commission's first order, unanimously rejected all of these arguments, sustained the Commission's order and dismissed the complaint. At the end of its opinion the district court stated:

> "In conclusion it will suffice to say that in our view the Commission has dealt thoroughly with a highly complex problem and after full and painstaking study has come up with a rational and fair solution as simple and convenient as the intricacy of the problem permits." (Appendix F to Jurisdictional Statement, No. 343, p. F9).

The action in the District of Nebraska was brought by 22 Class I railroads that are net car hire creditors and that, because of the weighting of votes according to the number of cars owned, have been able to dominate the industry committee which has set car hire rates.

Their attack was directed against the car hire payments prescribed by the Commission for application in

the future.[19] The principal basis for the attack was an argument that because of the 1966 amendment of Section 1(14) (a) of the Act the Commission could not lawfully prescribe a basic per diem rate based solely on the costs of ownership but was required at the same time and in the same proceeding to determine whether incentive elements should be added to the basic per diem rates in order to encourage car ownership. In support of this position it was argued that the Commission had disregarded the statutory command by considering the issue of incentive payments in a separate proceeding and deferring a determination of that issue until it had collected and analyzed the information it deemed necessary for an intelligent decision. Specifically, the Nebraska appellants attacked the Commission for having included a mileage element in the formula used to determine reasonable car hire rates for the future, arguing that a time-mileage formula would have an adverse effect on car supply. They also argued that the Commission had erred in its findings concerning the appropriate rate of return to car-owning railroads on their investment in freight cars.

The Nebraska District Court, with one judge dissenting, rejected these arguments.[20] The principal opinion, written by District Judge Robinson, held that the 1966 amendment did not deprive the Commission of authority to prescribe compensatory or basic per diem rates solely on the basis of costs and that the Commis-

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[19] This description also covers the states that intervened in the Nebraska action and that are appellants in No. 480 in support of the plaintiff railroads.

[20] The opinions are reproduced as Appendix A in the Joint Appendix to the Jurisdictional Statements in Nos. 480 and 497, pp. 1a-36a.

sion had discharged its obligations under the statute by considering whether an incentive element should be added to the basic per diem charge in the separate proceeding instituted for that purpose and by deciding in that proceeding to defer the resolution of the question pending the collection and analysis of the relevant facts. In a concurring opinion, Circuit Judge Ley similarly held that the Commission had substantially complied with the mandate of the 1966 amendment by establishing in the first instance a basic per diem rate and deferring judgment as to the addition of any incentive element until facts necessary for that determination could be obtained. Judge Ley also pointed out that a remand would not accomplish any meaningful purpose "but would simply delay the effective date of the new per diem rates" and would result in "the continued use of the older and inferior method of per diem charges." (Jt. Appendix to Jurisdictional Statements in Nos. 480 and 497, p. 32a). The dissenting judge was District Judge Van Pelt, who said that the Commission was bound to consider basic per diem rates and incentive rates in the same proceeding.

## ARGUMENT

These appeals raise no questions that deserve plenary review by this Court. The Commission's determination of reasonable per diem rates for the past and its prescription of reasonable rates for the future rest upon reasoned findings that are supported by substantial evidence. The findings are the result of a detailed and painstaking investigation and appraisal of the facts relating to the costs of car ownership, and they reflect the analysis and recommendations of the Commission's own Cost Section. In a real sense, therefore, the findings embody the informed and expert

judgment of the Commission on issues that fall within its administrative competence.

Given the intricacies of the car hire problem and the conflicts among the carriers involved, it may be that no administrative or judicial action can satisfy all sides. Indeed, the Commission in significant respects rejected arguments of these appellees that they believed to be meritorious. If, however, the Commission's order here is sustained it will facilitate a fair and orderly disposition of the quarrels of the past and establish for the future uniform basic car hire rates that fairly reflect the costs of ownership and thus remove most if not all of the confusion and controversy that have plagued the railroad industry for many years.

The circumstances, therefore, call for a prompt disposition of these appeals unless the appellants show that they present genuine and substantial questions of law that justify extensive briefs and oral argument. The appellants have not made this showing.

We shall undertake to demonstrate this in what follows, addressing ourselves first to the arguments of the Nebraska appellants and then to the arguments of the Massachusetts appellants.

**I. The Commission Did Not Violate Section 1(14)(a) by Prescribing Basic Per Diem Rates Solely on the Basis of the Elements of Ownership Cost and Considering the Question of Car Supply and Incentive Payments in Separate Proceedings**

The Nebraska appellants contend that the Commission violated Section 1(14)(a) of the Interstate Commerce Act by prescribing basic car hire rates for the future for all freight cars solely on the basis of the

costs of ownership and without giving consideration to evidence relevant to the effect of the rates on car supply. Specifically they attack the Commission for using a time-and-mileage formula instead of a straight time formula; they allege that this will have a "serious impact" upon car supply. (Jurisdictional Statement, No. 497, pp. 14-18).

The Nebraska appellants do not contend that the evidence as to the costs of car ownership does not justify the use of a mileage factor in prescribing car hire rates that are based upon costs. The Commission carefully considered, as it had been directed to do so by the Massachusetts District Court, whether there should be a time-mileage formula in order to provide as accurately as possible for reimbursement by various car users of actual ownership costs. It concluded that there should be a time-mileage formula. In terms the Nebraska appellants go no further in their Jurisdictional Statement than to urge that the Commission erred in failing to consider the effect of its adoption of a time-mileage formula on car supply. Presumably, however, this argument is designed to impel the Commission to take some action based on its consideration of car supply—either to revert to a time measure alone or at least to alter the time-mileage formula substantially even though the time-mileage formula adopted is solidly grounded in the cost evidence of record. The appellants are ultimately urging, therefore, that the Commission was bound to determine in the proceedings before this Court whether incentive car hire rates—rates that will do more than provide reimbursement of car owners for their costs by charges that are equitably shared by car users—are required by car supply considerations and, if they are, to prescribe

them in substitution for or in addition to the cost-based car hire rates the Commission did fix. There is no warrant for that position in Section 1(14)(a) of the Act as amended in 1966.

It is not disputed that the Commission gave consideration to car supply and the kind of incentive payments the Nebraska appellants seek in the separate proceeding, Ex Parte No. 252, that led to its report in *Incentive Per Diem Charges,* 332 I.C.C. 11 (1967), which was issued prior to the order here involved. In that report the Commission found that at the present time it did not have the information necessary to determine whether considerations of car supply required incentive payments; it declined to act on "conjecture." Accordingly, the Commission thereafter instituted further proceedings, which are still in progress, for the purpose of obtaining information necessary for intelligent action on the question of incentive payments. 332 I.C.C. at 16-17. (See pp. 12-13, *supra*). The Nebraska appellants did not seek judicial review of this action by the Commission and do not now suggest that it was not justified on the record.[21]

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[21] All of the carriers that are appellants in No. 497 had a full opportunity in Ex Parte No. 252 to present any relevant evidence to the Commission. It is significant that in its report the Commission found:

> "The evidence presented by the respondents in this proceeding is substantially unanimous that (1) present operating practices would not be improved (2) nor would more effective use be made of freight cars (3) nor would the building of more freight cars be generated as a result of applying an interim incentive charge. The appreciable differences which now exist between charges for cars of varying value under the multi-level per diem rate schedules do not result in distinctions of efficient use between the higher and lower rated cars and we are not satisfied, on this record, that addition of

There is thus no basis for any argument that the Commission has simply disregarded questions of car supply and incentive payments. The position of the Nebraska appellants must therefore be either that any basic per diem rate applicable to all freight cars must necessarily reflect both cost and incentive elements, or that by reason of the amendment to Section 1(14)(a) the Commission cannot prescribe basic rates for all freight cars unless at the same time and in the same proceeding it considers and deals with the question of incentive payments.[22] The statute provides no warrant for either position.

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an interim incentive charge would have any greater impact." 332 I.C.C. at 16.

This finding does not preclude the possibility that upon the further investigation that the Commission is now conducting it may obtain evidence that will justify the imposition of an incentive payment. It does indicate, however, that the appellant carriers in No. 497 presented no evidence to the Commission that would justify such payments at this time.

[22] The first position is suggested by the attempt of the Nebraska appellants to derive support from one passage in Palmer v. United States, 75 F. Supp. 63, 68 (D.D.C. 1947). They appear to argue that the passage held that even before § 1(14)(a) was amended the Commission, in prescribing per diem rates, was required to give weight to questions of car supply. (Jurisdictional Statement, No. 497, p. 17.) This is an inadmissible reading of the court's remark; read in context it merely makes the obvious point that a per diem charge that properly reflects the costs of ownership but is based on time alone is not unlawful because it may have the collateral effect of encouraging the prompt return of cars. Contrary to appellants' contention, the court in that case squarely held that under the law as it then stood the Commission could not lawfully include in the per diem charge any amount designed as a stimulant to the prompt handling and return of cars. The court pointed out:

> "In fact, it is agreed that the Commission has never heretofore in thirty years attempted to include in the per diem charge any extra amount intended for a purely regulatory purpose." 75 F. Supp. at 68.

The amendment directs the Commission in prescribing car hire rates for "any type of freight car" to "give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply." The operative obligation imposed upon the Commission by this direction is to determine

> "on the basis of such consideration whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense."

And significantly the amended section provides that the Commission shall not make incentive elements applicable to "any type of freight car the supply of which the Commission finds to be adequate" and that the Commission may exempt from payment of the incentive charges any group of carriers if the Commission finds that to be in the national interest.

The language of the amendment thus plainly recognizes the distinction between basic per diem charges "computed solely on the basis of elements of ownership expense" and applicable to all railroads and all types of freight cars, on the one hand, and incentive payments, which are increases in or additions to the basic per diem charges, which are subject to different standards and limitations, and which are not necessarily

applicable to all types of freight cars and all carriers, on the other. Nothing in this language can be read as requiring the Commission to fix basic per diem rates applicable to all cars and all carriers that reflect both ownership costs and incentive elements, or as imposing upon the Commission an absolute obligation to deal with basic per diem rates and incentive payments at the same time, in the same proceeding and in a single order.

In particular, there is no substance to the Nebraska appellants' plaint that the impact on car supply of the time-mileage system prescribed by the Commission "falls between two chairs" because it was not considered in the proceedings before the Court or in the incentive per diem case. (Jurisdictional Statement, No. 497, p. 16). If a time-mileage system is necessary or appropriate accurately to apportion reimbursable car ownership costs among users, as the Commission found, the statute plainly contemplates its use in the prescription of basic car hire rates for all freight cars. If the supply of a type of freight car is found inadequate, then the Commission may increase the basic compensation provided by the time-mileage formula by incentive elements. At neither stage is the impact on car supply of the time-mileage system necessarily relevant. The failure to consider the supposed impact of a time-mileage formula on car supply in the proceedings before the Court will in no way hinder the Commission in the pending incentive proceeding from determining whether, for any type of car, incentive rates are needed to ensure an adequate supply and, if they are found needed, from prescribing such incentive rates.

The reading of the amendment just urged is supported by its legislative history, which is discussed in

detail in the opinion of District Judge Robinson in the Nebraska case. (Jt. Appendix to Jurisdictional Statements, Nos. 480 and 497, pp. 14a-19a). That history may be summarized as showing that Congress deliberately rejected a proposal that would have required the Commission to provide for an incentive element in a single general proceeding directed to the fixing of basic compensation for all types of freight cars.

In the instant case the Commission fully complied with both the letter and the purpose of amended Section 1(14)(a). It considered questions of car supply and incentive payments in a proceeding instituted for that purpose, found that the information necessary for an intelligent determination of those questions was not then available and is now engaged in a continuing investigation of the relevant facts. The appellants had and have a full opportunity to participate in that proceeding and to present to the Commission any evidance that they believe justifies the imposition of incentive charges. The fact that the Commission took these steps in a separate and independent proceeding involves no breach of statutory duty or abuse of discretion. This Court has long held that an agency has discretionary authority to approach and to deal with a complex regulatory problem in logical steps. *American-Commerical Lines* v. *Louisville and N. R.R.*, 392 U.S. 571; *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 150, 153-54; *SEC* v. *Drexel Co.*, 348 U.S. 341, 346-47; *New York* v. *United States*, 331 U.S. 284, 343; *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583-85; *New England Divisions Case*, 261 U.S. 184, 200-01.

There are powerful considerations that support the wisdom of the course that the Commission followed.

Since the basic per diem rates have been in dispute in the industry for many years and since any incentive payments would be additions to the basic per diem rates it was both sensible and logical for the Commission to deal with the basic per diem rates as soon as that question was ripe for decision. In this connection, it may be noted that in the incentive per diem charges case a number of the Nebraska appellants urged that no decision should be reached with respect to incentive payments until the Commission had first prescribed the basic per diem rates.[23]

**II. The Commission Made Reasoned Findings Based on Substantial Evidence in Support of Its Ultimate Conclusions as to the Return Element of Car Ownership Costs**

The Nebraska appellants also urge that in determining the return element of freight car ownership costs the Commission did not make reasoned findings based upon substantial evidence.

In part their argument on this score relates to the fact that the Commission devised its own formula for computing the rate at which a car owner should be

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[23] See, *e.g.*, Brief of Missouri Pacific R.R., filed May 29, 1967, p. 12 ("Before the Commission proceeds to determine the need for incentive per diem it should first determine the basic compensation in the pending dockets 33145 and 34405."); Brief of Norfolk & Western Ry., filed May 29, 1967, p. 3 ("[T]o try to formulate incentive per diem before the basic per diem rates are resolved seems somewhat like trying to design the arch of a bridge without any information as to the foundation."); Joint Brief for the Atchison, Topeka and Santa Fe Ry., the Baltimore and O. R.R., the Chesapeake & Ohio Ry., the Denver and Rio Grande Western R.R., Great Northern Ry., Illinois Central R.R., Northern Pacific Ry., and Western Maryland Ry., filed May 28, 1967, p. 3 ("Before exercising its incentive per diem power the Commission must exercise its regular per diem power by establishing reasonable rules and regulations with respect to fixing basic per diem rates.")

compensated for what it spends and borrows to buy its car instead of accepting in its entirety any of the formulas offered by the parties or the formula adopted by its hearing examiner. There is nothing in the requirement of substantial evidentiary support for agency findings that forecloses an agency from taking, on the basis of evidence, an approach not suggested by any of the parties. That is what the Commission did here. An agency is not supposed to be the prisoner of the contentions addressed to it by the parties. *Cf. CAB* v. *State Airlines*, 338 U.S. 572.

The Commission arrived at an interest rate or return element of 6 percent before federal income taxes on the undepreciated balance of the original cost of a freight car. This figure resulted from allowing to the owner an interest rate of 4 percent on 60 percent of the original cost, representing what is financed through equipment trust obligations or similar secured debt instruments, and 9 percent on the remaining 40 percent, representing the cost to the car owner of its own investment with an allowance for the loss in purchasing power of the dollar. (332 I.C.C. at 211-13).

Besides the general assertion that the Commission's conclusions "were not supported by any evidence" because the Commission used methods that had not been advocated by the parties or the Commission's staff, the Nebraska appellants make two specific allegations. One is that the return "is plainly inadequate where the interest on debt alone exceeded 6 percent when the record was made, and now exceeds 8 percent." (Jurisdictional Statement, No. 497, p. 19). This is an argument that the Commission was bound to rely upon a transitory phenomenon, the abnormally high interest rates of the last two years, instead of the evidence of record. The evidence of record was that the

average interest rate on outstanding equipment obligations—and these are the relevant debt instruments in this case since it is through them that freight cars are financed—was 3.849 percent during the period that was the subject of the Commission's elaborate cost study. (332 I.C.C. at 213). Moreover, much of this cost of debt is an embedded cost. The Commission found that one-fifth of the freight cars in interchange service as of January 1, 1962, were more than 30 years old, a proportion that had increased slightly since 10 years earlier; and that of all cars in service on January 1, 1962, nearly 38 percent were over 20 years old and more than 49 percent were over 15 years old. (*Id.* at 196). In the circumstances it would have been irrational for the Commission to ignore the cost of outstanding debt shown on the record and rely upon current interest rates. In any event, there is no evidence whatever by how much, if at all, interest rates on equipment obligations had increased at the time the record was made (although there was ample opportunity for any of the parties to demonstrate on the record that the 3.849 percent figure was no longer a useful index to the cost of debt capital). Moreover, if the cost of debt as calculated by the Commission is now dated, there are remedies available to the appellants under the Commission's order, of which they are fully aware, that do not involve setting aside altogether the results of the Commission's 15-year inquiry into the proper level of car hire rates.[24]

[24] The Commission asked the carriers to give the prescribed per diem rates "a fair opportunity, through practical application." It said that they would be expected to try to reconcile any differences that might develop among them after a fair opportunity had been given before calling on the Commission to modify the presented rates. The way was clearly left open for Commission action to modify the rates should such action become necessary. (332 I.C.C. at 256-57; see also *id.* at 230, 234).

The other specific point sought to be made by the Nebraska appellants depends upon wrenching a quotation from the Commission's opinion out of its context. Before the Commission the Nebraska appellants urged that the cost of equity capital determined as it would be in a rate case in which a cost of capital approach to rate of return was used should be used to compute the return to be allowed to car owners on the unfinanced or down-payment component of car acquisition costs. The Commission explained in detail, as its hearing examiner had also explained, why the use of that method is inappropriate in determining how much carriers should pay one another for the use of one another's equipment. (332 I.C.C. at 211-13; Appendix D to Jurisdictional Statement, No. 343, p. D86). The Commission summed up by saying that "freight cars are built to meet anticipated needs of shippers and to earn freight revenues, and that little consideration, if any, is given to the possible income from per diem payments in the decision to acquire cars." (332 I.C.C. at 212-13).

In addition, the Commission said, in reference to the cost of capital approach urged by the appellants, that "no evidence is of record on this point." (332 I.C.C. at 212). That is the quotation the appellants seize upon in their argument. But the Commission was merely saying that, even if the appellants' proposed method of determining the cost of equity capital were not rejected, the figures were not available to make the kind of equity cost analysis they urged. The Commission clearly was not saying that there was no evidence to support its own determination of the proper return on the equity portion of freight cars. The Commission found affirmatively that a return of 4 percent after federal income taxes is reasonably related to the return generally available from investments hav-

ing similar risks. It noted that railroads earned a return from freight service of 4.5 percent after taxes in 1960 and noted further "our conclusions in cases of similar reciprocal charges based upon costs, that 4 percent after taxes produced a fair return on value." The rate of 9 percent before taxes that the Commission in fact allowed on the equity portion of freight car acquisition costs produces, according to the Commission, approximately 5.5 percent after taxes. This is higher than the 4 or 4.5 percent the Commission mentioned as a reasonable rate so that, among other things, car owners will be compensated for the impact of inflation on their car costs. (332 I.C.C. at 213).

The Commission made reasoned findings on the return element of car costs that are based upon substantial evidence. The argument to the contrary is without merit.

### III. The Commission Had Unquestionable Authority To Determine Car Hire Rates for the Past for the Benefit of the Courts

We turn in this section and the succeeding sections of this motion to the arguments of the Massachusetts appellants, the appellants in No. 343.

The Massachusetts appellants contend that the Commission had no power to determine reasonable past period car hire rates. In doing so they reiterate their principal contention in the previous review proceeding, a contention that was rejected by the district court and not passed upon by this Court. (See pp. 6-8, *supra*).[25] They advanced the contention anew without

[25] The district court held that § 1(11) of the Interstate Commerce Act imposes upon railroads a duty to establish and maintain just and reasonable car hire charges and that that duty can be enforced otherwise than through the Commission's power to prescribe reasonable car hire rates for the future under § 1(14)(a). As stated

any recognition that the issue of the Commission's power to determine reasonable past period rates has been altogether changed by intervening events since the case was here before.

The change was brought about by the request made to the Commission for advice to the United States court and the state court in New York as to what reasonable car hire rates were in the period for which car hire balances were in litigation before them. These requests render unsubstantial the jurisdictional issue the appellants pose.

In specific response to these requests and solely for the purpose of the New York litigation, the Commission, having found that the AAR rates had not been shown to be just, reasonable or otherwise lawful, found that certain rates were the "just, fair, reasonable, and

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above, however, the district court set aside the Commission's order on other grounds, and, because of the expressed willingness of the Commission to proceed pursuant to the terms of the district court's remand, this Court did not pass upon appellant's basic contention. It dismissed their appeal "without prejudice to raising the 'adjudicatory' issue again, if it survives the further Commission proceedings." 358 U.S. at 72.

Whether the "adjudicatory" issue, the shorthand term used to describe the question of the Commission's power to adjudge the reasonableness of past per diem charges, did survive the further Commission proceedings is dubious. The precise "adjudicatory" issue raised earlier was the power of the Commission to make a declaratory ruling concerning whether the industry car hire rates were reasonable and otherwise lawful. The appellants were aggrieved because the Commission's ruling was that the rates were lawful, whereas they maintained that the rates were unlawfully high. In the reopened and expanded proceedings the Commission ruled that the AAR rates had not been shown to be lawful. Thus the Commission has ruled favorably to the appellants in the matter that underlay the "adjudicatory" issue they previously raised, and they are not aggrieved.

nondiscriminatory rates, proper as daily charges for the settlement of per diem balances *by and between the parties to pending suits herein before described* [the suits in the New York courts] . . .", (332 I.C.C. at 256). (Emphasis added). These findings were not an exercise by the Commission of any asserted independent adjudicatory power. They were solely in response to the requests for advice that the Commission had received. The Commission made this crystal clear:

> "However, our findings in Docket No. 31358 as to the reasonableness of the rates charged in the past are of significance only as an aid to the courts in settling the amount of damages in the pending lawsuits." (332 I.C.C. at 183).

The court below similarly recognized the function of the findings made by the Commission with respect to per diem rates for past years, saying that "in fixing rates for past years the Commission was speaking directly to the United States District Court for the Southern District of New York and the Supreme Court of the State of New York for New York County." (Appendix F to Jurisdictional Statement, No. 343, p. F7).

There can be no doubt of the Commission's power to render advice to a court upon request concerning a matter within its competence. *El Dorado Oil Works* v. *United States*, 328 U.S. 12; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S.422. Nor is there any doubt that the reasonableness of car hire charges is a matter within the Commission's competence. This is clear from Sections 1(10), 1(11) and 1(14)(a) of the Act. Indeed, the majority of the Massachusetts court in the first review proceeding held that Sections 1(10) and 1(11),

broadly defining car service and directing railroads to establish and observe "just and reasonable rules, regulations, and practices with respect to car service," empowered the Commission to act even without any judicial request. Add to this the fact that Section 1(14)(a) makes the compensation to be paid for car use one of the car service practices that the Commission is specifically authorized to regulate, and there can be no doubt that, as this Court said when a strikingly similar challenge to the Commission's authority to render advice to a court concerning the lawfulness of past practices was raised, "the 'reasonableness and legality,' of the past dealings here involved" are matters which Congress has entrusted to the Commission. *El Dorado Oil Works* v. *United States*, *supra* at 19. The New York courts deferred to the Commission, and the Commission responded appropriately. The legality of its so responding is established by the *El Dorado* cases.

Appellants apparently were far enough convinced that there was no longer any plausible basis for asserting their previous position on the "adjudicatory" issue that they did not bother even to question the Commission's jurisdiction in their argument to the Massachusetts court on review of the decision in the remanded proceedings. They raise the jurisdictional issue here apparently because of a passing comment in the opinion of that court. The court said that "the Commission in the exercise of its powers under § 1(14)(a) . . . fixed separate rates for freight car use for each year from 1953 to 1965 inclusive" and prescribed a method for calculating future car hire charges. (Appendix F to Jurisdictional Statement, No. 343, p. F3). The reference by the court to Section 1(14)(a) was natural, given the fact that the question of the source of

the Commission's jurisdiction over past-period charges had not been argued, since Section 1(14)(a) is the unquestioned source of the Commission's power to prescribe future charges. Even if Section 1(14)(a) permits prescription only of future charges, there was a more than adequate jurisdictional basis for the Commission's determination of reasonable past charges for the benefit of the courts that asked for that determination; the district court's statutory reference cannot alter that fact.

## IV. There Is No Substance to the Massachusetts Appellants' Allegations of Defects in the Commission's Determination of the Proper Level of Past and Future Car Hire Charges

The Massachusetts appellants urge a number of points, all of them satisfactorily disposed of by the Massachusetts court and none of any general importance, in an attempt to support their ultimate position that the past rates determined by the Commission to be reasonable are too high and the method prescribed by the Commission for determining rates for the future will yield rates that are too high. The contrast between this position and that of the Nebraska appellants, who believe that the future rates will be too low, suggests the propriety of the balance struck by the Commission.

### A. The Question of the Car Repair Deficiency Setoff

One of the elements of a cost-based car hire charge is the cost of repairing cars. Sometimes a freight car develops a need for repair when it is on a user's line. For the sake of efficiency the user makes the repair and, unless the need for the repair was caused by him, bills the owner. The billing is at rates agreed to by the railroads through the AAR. There was evidence in

the Commission proceeding that the AAR repair rates do not cover all costs that for some purposes might be allocated to the repair of a particular car: the rates cover the cost of materials and labor but include no allowance for such things as maintenance of the car repair shops (which would have to be maintained even if no foreign cars were repaired). The Massachusetts appellants take the position that there should be an adjustment in the car hire rates on account of the resulting so-called car repair deficiency. They took this position before the Commission even though there was also evidence before the Commission, which both the Commission and the court took note of, that two of the principal appellants, the Boston & Maine and the New Haven, benefited from the failure of the AAR repair rates fully to cover repair costs: more of their cars were repaired off-line than foreign cars were repaired by them. (332 I.C.C. at 191-92; Appendix F to Jurisdictional Statement, No. 343, p. F5). (Nevertheless—and this explains their position—as net car hire debtors they would benefit if an across-the-board adjustment were made in the car hire rate on account of the supposed car repair deficiency.)

One of the steps in the Commission's computation of car ownership costs was to total freight car repair costs in a test year, by whatever railroad incurred. This was the basis for the necessary computation of average per car repair costs that would enter into the car hire rates. (332 I.C.C. at 188-89). The question whether user roads were fully reimbursed for the costs they incurred in repairing other roads' cars was treated by the Commission as a matter separate from this total of repair costs and the resulting average cost per car.

The Commission found that "the determination of reasonable compensation to the owner of a freight car

for the costs of purchase and maintenance of a car which it puts into per diem service is a problem distinct from the adequacy of payments it makes to other parties for performance of some of its responsibilities. The issue of setoff payments should not be allowed to become the solution sought in this proceeding." (332 I.C.C. at 180). The Massachusetts District Court agreed. It held that it was "well within the bounds of the Commission's discretion to treat the items separately, at least until the short-haul lines make some attempt to change AAR repair rates if they think changes to their financial advantage." (The court noted in this regard that the single effort of the Boston & Maine to have an AAR billing rate changed through AAR procedures was successful.) (Appendix F to Jurisdictional Statement, No. 348, p. F6).

The appellants now profess to be satisfied that the Boston & Maine and the New Haven should be remitted to an attempt to recoup by way of counterclaim in the New York suits what they claim to have lost because of the failure of the AAR car repair reimbursement formula to cover all of the overhead and other accounting costs associated with car repair.[26] But the appellants immediately retract this purported concession by saying that the amount of the car repair deficiency should be deducted from the costs on the basis of which car hire charges are computed. To do what the appellants advocate would produce the same result as making a setoff, and not even the appellants would contend that they are entitled to both a setoff and their manner of figuring costs. However their position is stated, what the appellants seek is a credit in this pro-

[26] Whether such a counterclaim is appropriate in the New York suits is a matter of contention there.

ceeding for the supposed car repair deficiency, and the Commission's reasoned judgment, sustained by the court, is that the proceedings should not be encumbered with litigation over the propriety and amount of any such credit.

Moreover, as the example of the Boston & Maine and the New Haven themselves shows, to treat the so-called car repair deficiency either as a setoff against per diem or as a deduction from the costs on which per diem is based would result in the grossest of inequities. Those two carriers would receive the double benefit of favorable repair balances and a reduction in their car hire charges to take account of the very factor that gives them their favorable repair balances. There is no evidence that a general reduction in car hire on account of the car repair deficiency, if any, would work to compensate the railroads suffering from any such deficiency; there is substantial evidence to the contrary. In the circumstances the Commission was obviously right, as the Massachusetts court held, in treating the purported deficiency separately from cost-based car hire charges.

### B. The Question of the Inclusion of the Mileage Element in Car Hire Charges for the Past

Some elements of freight car ownership costs are attributable to the passage of time and some to the use of the car. In its earlier decision the Massachusetts court set aside the Commission's order on the ground that it had not considered carefully enough the possibility of dividing car hire charges into two elements—one to compensate an owner for the time his car spends off-line and the other to compensate him for the wear and tear caused by its use off-line.

As we have seen in the discussion of the Nebraska appellants' main argument (pp. 20-21, *supra*), on remand the Commission carefully considered the wisdom of instituting a time-mileage system and did adopt it as the method of computing car hire charges for the future. For past periods, however, the Commission found that "no practicable and probative method has been demonstrated on this record by which a reliable estimate might be made as to the distribution of costs between time and mileage for individual defendants in past years, or for all railroads for years other than 1960 [the assigned test year]." (352 I.C.C. at 247). For the court below, respect for whose mandate was at stake, this was enough. The court said that "the law does not demand the impossible" and added that it was within the Commission's discretion to find reasonable rates for the past on a straight time basis rather than to add a mileage factor, "which would not be based upon data but could rest only upon surmise." (Appendix E to Jurisdictional Statement, No. 343, p. E6).

There is no need for further review of this obviously correct judgment.

### C. The Question of the Adjustment for Inflation

One of the costs for which a freight car owner is reimbursed by car hire payments is the cost of the capital invested in the car. As discussed above in relation to the second question raised by the Nebraska appellants (pp. 27-31, *supra*), the Commission engaged in a thoughtful analysis of how the return element of car costs should be computed. One question was the extent to which, if at all, the loss in purchasing power of the dollar should be recognized in determin-

ing a car owner's capital costs. The Commission concluded that, because of the extent of use by railroads of borrowed funds for acquiring cars and the typical period for which funds are borrowed, an allowance for inflation on 40 percent of the original cost of cars "results in the payment by car users of just and reasonable compensation to car owners for the burden resulting from decreased purchasing power of their invested funds." (332 I.C.C. at 205). The Massachusetts appellants do not quarrel with this determination.

Their only contention on this score goes to the subsidiary question of the index used by the Commission to measure the decreased purchasing power of the dollar. The index chosen was an authoritative index of freight car prices produced by the railroads and the ICC staff. This Account No. 53 Index, as it is called, shows the relationship of prices for each year since 1914, using prices in the 1910-14 period as 100. The index for each year is a composite figure based upon the percentage of each type of car and equipment in Account No. 53, which is a property account, a part of the Uniform System of Accounts prescribed for railroads by the Commission. (332 I.C.C. at 210).

Appellants object to the use of this freight car price index and say that some other more general price index such as the Bureau of Labor Statistics' wholesale price index should have been used because the Account No. 53 Index reflects not only inflation but also the effect upon prices of improvements in freight cars. The Commission recognized this. It said that the Account No. 53 "index must be treated with caution and indications of inflation resulting from its application to original costs employed only as approximations." It noted that "these approximations decline in validity as they

are applied to more distant past years." Instead, therefore, of applying the index directly to costs, it made an allowance in the interest rate on the railroads' invested funds, "which approximates the impact indicated by the index in more recent years but modifies the indication for more distant periods." (332 I.C.C. at 210-11; see p. 31, *supra*).

Quite rightly, the district court could find no error in this. The court made the commonsense point that it is "more appropriate" to use a freight car price index as a guide to rising car acquisition costs than, for example, the general national wholesale price index. (Appendix F to Jurisdictional Statement, No. 343, p. F7). There is no justification for further review.

**D. The Question of the Use of Average Costs**

The Commission constructed the car hire rates it found reasonable for the past and the method it prescribed for computing them in the future on the basis of a far-ranging study by its staff of the costs associated with ownership of all the cars in the national fleet of per diem cars. Characterizing this as the use of "nationwide average costs," the appellants say that the technique is unlawful for determining the appropriate level of car hire rates for a past period. They cite *Keith Ry. Equip. Co.* v. *Association of American Railroads*, 274 I.C.C. 469, 481 (1949), for the proposition that the Commission has recognized that there is a distinction between "adjudicatory proceedings" and "rule-making proceedings" so far as the use of average costs is concerned and suggest that the case established or is representative of "orthodox principles" from which the district court deviated in approving the method employed by the Commission here. In the *Keith* case there was a single complainant, who urged

"that the reasonableness of a mileage rate cannot be determined legally with relation to any single car owner"; in response the Commission "noted that this proceeding is not concerned with rates for the future, but for a period in the past . . . ," thus apparently suggesting to the appellants that in considering past-period rates the Commission can act only on the basis of individual car owners' costs. This conclusion does not seem to follow from what the Commission said, and in any event the Commission did not rule on the point. It found the point academic because during the period in question the operating results of the complainant approximated industry results.

Thus, no rigid "orthodox principles" such as appellants purport to find in the *Keith* case are to be found there, and the district court, in approving the use of averages, did not deviate from any such principles. The Massachusetts court said that "costs are not so dissimilar that use of an average figure would work any great injustice." (Appendix F to Jurisdictional Statement, No. 343, p. F9). It thus held that the Commission had correctly applied a principle applicable to adjudicatory and rule-making proceedings alike—the principle that where averages are used in the determination of issues involving a large number of separate transactions between a large number of railroads the averages must be typical. See *United States* v. *Abilene & So. Ry.*, 265 U.S. 274; *New England Divisions Case*, 261 U.S. 184, 196-99.

The carriers that initially complained against the group now represented by the Massachusetts appellants own freight cars amounting to 88 percent of the national Class I railroad fleet of per diem cars. It was plainly in order for the Commission to take its

findings on the average ownership cost of all such cars as typical of the ownership costs of 88 percent of such cars. Moreover, the use of the national average favored the appellants. The record shows that the cars that the appellants actually used had values substantially in excess of the national average.

### E. The Question of the Zone of Reasonableness

The Commission found that the rates embodied in the industry agreement since 1953 had not been shown to be reasonable. It found for each year beginning with 1953 and through 1965 a rate that was reasonable as between the litigants in the lawsuits in New York and set out a method for determining the reasonable rates in any subsequent year that may be in litigation. That was in response to the requests for advice to the two New York courts.

The Massachusetts appellants assert that the Commission did not in terms find unreasonable the rates at which some of them have been offering to settle car hire balances since 1953 and that such rates may be within a zone of reasonableness along with the Commission's rates. There are two answers. One is that the district court asked for advice as to a reasonable rate—not a range of reasonable rates—and the Commission supplied it and the New York state court with precisely what was asked for. As the Massachusetts court said, "In answering the references the Commission properly was not concerned with any possibly proper or reasonable zone or range of rates but only with a specific rate upon which awards for past use should be based." (Appendix F to Jurisdictional Statement No. 343, p. F7). Second the Commission in determining a schedule of annual reasonable rates in-

plicitly and necessarily found, insofar as it was required to make any finding on the point at all, that the rates proposed by some of the appellants were unreasonable. This is no different from the situation in which an agency prescribes a single reasonable rate to be charged to shippers and rules out all other rates as unreasonable even though before the agency acted some range of carrier-initiated rates could have been found reasonable. The Massachusetts court was clearly correct when it said that in finding that certain rates were the lawful rates it "indicated that any other rates would not meet that standard." (*Ibid.*)

**V. The Substitution of Hearing Examiners Was Handled Properly by the Commission, and Appellants Have Alleged No Prejudice**

Without alleging any prejudice, the Massachusetts appellants complain because nine years ago, at the request of the hearing examiner then assigned to the case, the Commission relieved him of his duties and appointed another hearing examiner in his place. This was after two prehearing conferences, concerned solely with procedural matters, had been held and before any evidence had been taken. The appellants claim that this action of the Commission violated provisions of the Administrative Procedure Act. One of these provisions, now codified as 5 U.S.C. § 556(b), is to the effect that an examiner "may at any time disqualify himself" and that in the event of a challenge to an examiner's qualifications the agency shall determine the matter. As the Commission said in response to appellants' petition after the substitution of hearing examiners took place, this provision was inapplicable because there was no suggestion of disqualification, but "this section . . . does not prevent an agency

from relieving a hearing examiner from an assignment upon his request, for such reasons as the agency considers adequate." (Appendix G to Jurisdictional Statement, No. 343, p. G5). The proposition seems unassailable. The other provision invoked by appellants is 5 U.S.C. § 3105, which provides that "hearing examiners shall be assigned to cases in rotation so far as practical. . . ." The substitute examiner may or may not have been assigned in rotation. In response to appellants' petition the Commission said that it had long since determined that "the assignment of hearing examiners in strict rotation is impracticable; indeed, impossible, if economy and efficiency in administration are to be achieved." (Appendix G to Jurisdictional Statement, No. 343, p. G5). There is no occasion for going behind the Commission's words.

The district court found this point so unsubstantial as to be unworthy of specific mention. It is certainly not worth this Court's plenary review.

## CONCLUSION

For the reasons set forth above the judgments of the district courts should be affirmed.

Respectfully submitted,

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October 1969

# APPENDIX

## APPENDIX

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

THE BALTIMORE & OHIO RAILROAD COMPANY, et al.,

*Plaintiffs,*

*against*

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY and BOSTON & MAINE RAILROAD,

*Defendants.*

Civil No. 148-323, et al.

**Order Granting and Denying Motions of Plaintiffs and Defendants, and Directing Immediate Entry of Partial Summary Judgment**

Defendants having moved herein for an order of this Court staying all of the actions herein, pending the final determination and after judicial review, if any, of two proceedings entitled *Chicago, B. & O. R.R. v. New York*, Docket No. 33358, and *Railroad Freight Car Per Diem Charges*, Docket No. 33145, now pending before the Interstate Commerce Commission, and said motion having come before this Court on February 9, 1960 and Plaintiffs and plaintiffs having moved herein (1) for an order of this Court granting summary judgment in plaintiffs' favor pursuant to Rules 54 and 56 of the Federal Rules of Civil Procedure, and (2) for an order of this Court striking the Fourth Affirmative Defense in defendants' Answers pursuant to Rule 12(f) of said Rules, and (3) for an order of this Court dismissing the Third Counterclaim in Defendants' Answers pursuant to Rule 12(b)(6) of said Rules and said motions having come before this Court on May 26, 1960 and May 27, 1960, and thereafter, and counsel for all parties having sub-

mitted to this Court a Joint Stipulation of Facts, with exhibits attached thereto, dated September 26, 1960, and approved by order of this Court of that date, and a Supplement to Joint Stipulation of Facts dated January 11, 1961, and thereafter supplementary exhibits filed January 13, 1961, and this Court having conducted extensive pre-trial hearings and received statements of facts, memoranda of law and affidavits filed in support of and in opposition to said motions and having heard oral argument thereon; and due deliberation having been had thereon, and upon all the pleadings and proceedings heretofore had herein and upon the opinion of this Court herein filed July 8, 1961; it is

1. Ordered, that the motion of defendants for a stay of these actions is denied; and it is

2. Further Ordered, that the motion of plaintiffs for an order granting summary judgment in plaintiffs' favor on the grounds that each defendant has failed to pay *per diem* at the rates which were at the various times set forth in the Code of Per Diem Rules—Freight for use of each plaintiff's freight cars in accordance with its obligation to each plaintiff contained in similar contracts known as "Car Service and Per Diem Agreements" is denied; and it is

3. Further Ordered, that the motions of plaintiffs to strike the Fourth Affirmative Defense and the Third Counterclaim in defendants' Answers are granted; and it is

[1] As to where this defense and this counterclaim are identified by different numbers are hereto listed, as follows:

| | |
|---|---|
| Baltimore & Ohio Railroad v. N. Y., New [illegible] Railroad Company [illegible] | Antitrust defense is designated as fifth affirmative defense and second counterclaim |
| Baltimore & Ohio Railroad v. Boston & Maine Railroad [illegible] | Antitrust defense is designated as fifth affirmative defense and second counterclaim |
| [illegible] Valley Railroad Company v. N. Y., New Haven and Hartford Railroad Company [illegible] | Antitrust defense is designated as third affirmative defense and second counterclaim |

4. FURTHER ORDERED, that partial summary judgments are hereby entered in favor of the plaintiffs in 21 of the actions herein, (a list of which actions is set forth in Appendix A hereto) and against the defendants to the extent only of declaring and adjudging that these plaintiffs are entitled to recover from defendants *per diem* in such amounts as are found by this Court to be due them based upon a rate to be found just, fair, reasonable and non-discriminatory by the Interstate Commerce Commission, of which said Commission shall advise this Court and thereafter to be ultimately determined and fixed by this Court for each month beginning with August, 1953 to date to be computed with interest; and it is

5. FURTHER ORDERED, that in the 88 actions (a list of which actions is set forth in Appendix B hereto) plaintiffs shall have partial judgments in their favor as to the liability of the defendants to said plaintiffs to the extent only of declaring and adjudging that these plaintiffs are entitled to recover from defendants *per diem* in such amounts

| | |
|---|---|
| Lehigh Valley Railroad Company v. Boston & Maine Railroad, 18-33 | Antitrust defense is dismissed as to third affirmative defense and second counterclaim |
| Western Maryland Railway Company v. N. Y., New Haven and Hartford Railroad Company, 18-319 | Antitrust defense is dismissed as to fifth affirmative defense and second counterclaim |
| Western Maryland Railway Company v. Bangor & Aroostook Railroad, 18-320 | Antitrust defense is dismissed as to fifth affirmative defense and second counterclaim |
| Missouri-Illinois Railroad Company v. Boston & Maine Railroad, 18-31 | Antitrust defense is dismissed as to fifth affirmative defense and third counterclaim |
| Missouri Pacific Railroad Company v. N. Y., New Haven and Hartford Railroad Company, 18-10 | Antitrust defense is dismissed as to fifth affirmative defense and third counterclaim |
| Missouri Pacific Railroad Company v. Boston & Maine Railroad, 18-30 | Antitrust defense is dismissed as to fifth affirmative defense and third counterclaim |
| Texas and Pacific Railway Company v. N. Y., New Haven and Hartford Railroad Company, 18-30 | Antitrust defense is dismissed as to fifth affirmative defense and third counterclaim |
| Texas and Pacific Railway Company v. Boston & Maine Railroad, 18-32 | Antitrust defense is dismissed as to fifth affirmative defense and third counterclaim |

as are found by this Court to be due them based upon a rate to be found just, fair, reasonable and non-discriminatory by the Interstate Commerce Commission, of which said Commission shall advise this Court and thereafter to be ultimately determined and fixed by this Court, for each month beginning with August, 1953, to date, to be computed with interest.[2] The entry of a final money judgment in favor of all plaintiffs, however, is stayed pending determination by the Interstate Commerce Commission of the *per diem* rate controversy in Docket No. 31358 presently there pending or until further order of this Court; and it is

6. FURTHER ORDERED, that the plaintiffs (a list of whom is annexed hereto as Exhibit C) with their consent are directed to amend their complaint in Docket No. 31358 to request the Interstate Commerce Commission, without regard to the proceeding pending in Docket No. 23145, to advise this Court what *per diem* rate was just, fair, reasonable and non-discriminatory for each month beginning with August, 1953, to date, for the purpose of the suits consolidated herein; and it is

7. FURTHER ORDERED, that the plaintiffs (a list of whom is annexed hereto as Exhibit D) with their consent are directed to petition for leave to intervene in said Docket No. 31358 for the purpose of requesting the Interstate Commerce Commission, without regard to the proceeding pending in Docket No. 23145, to advise this Court what *per diem* rate was just, fair, reasonable and non-discriminatory for each month beginning with August, 1953, to date, for the purpose of the suits consolidated herein; and it is

8. FURTHER ORDERED, that the plaintiffs herein be and hereby with their consent are directed within thirty days to amend their complaint or to petition for leave to in-

[2] Except in those actions where the plaintiffs have expressly agreed to waive their right to interest. Such determinations will be made at the time of entry of individual judgments in those actions.

tervene, as the case may be, in said Docket No. 31358 and the parties hereto be and hereby are directed to proceed with all reasonable dispatch, consistent with the procedures of the Interstate Commerce Commission, to the end that this Court be advised as to the just, fair, reasonable and non-discriminatory *per diem* rates as expeditiously as possible; and it is

9. FURTHER ORDERED, that the Court hereby retains jurisdiction for all purposes of the suits consolidated herein; and it is

10. FURTHER ORDERED, that the plaintiffs are directed to file with the Interstate Commerce Commission in said Docket No. 31358 a certified copy of this Order and to request for the Court its consideration and the advice sought; and it is

11. FURTHER ORDERED, that because of the important controlling questions of law involved herein as to which there is substantial ground for difference of opinion and because an immediate appeal from this order may materially advance the ultimate termination of the litigation, all questions raised herein are to be considered certified by me in accordance with the provisions of Section 1292(b), Title 28 U. S. Code; and it is

12. FURTHER ORDERED, that the opinion of this Court filed herein on July 5, 1961, and the Joint Stipulations of Fact filed by the parties herein on September 29, 1960 and January 11, 1961, shall constitute findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and shall be the equivalent of the Court's reasons for the immediate entry of partial summary judgment as herein granted, without further delay (Rule 54, Federal Rules of Civil Procedure).

Dated: New York, New York
June 15, 1962

(Sgd.) SYLVESTER J. RYAN
United States District Judge

SUPREME COURT, U. S.
FILED
NOV 27 1969
CLERK

Nos. 848, 490 and 497

# In the Supreme Court of the United States

OCTOBER TERM, 1969

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BOSTON AND MAINE RAILROAD, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

---

ARIZONA CORPORATION COMMISSION, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

---

UNION PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

---

*ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICTS OF MASSACHUSETTS AND OF NEBRASKA*

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## MOTION TO AFFIRM

---

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387-033—69——1

# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 343

BOSTON AND MAINE RAILROAD, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 480

ARIZONA CORPORATION COMMISSION, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 497

UNION PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

*ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICTS OF MASSACHUSETTS AND OF NEBRASKA*

## MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Inter-

further information was developed, and that full development of the facts pertaining to incentive factors should go forward in another proceeding. Such a proceeding is now pending, and in addition the Commission has considered car supply problems in the car service *Investigation* case, see p. 7, *supra*.

The Commission's determination to go about the task in separate steps is consistent with the 1966 amendment and is within the agency's discretionary power to manage its conduct of its business. As in *New York* v. *United States*, 331 U.S. 284, 343, "there is no reason in law why the Commission need tackle all evils in the rate structure as one. It may take one step at a time".[8] The instant subject warranted two steps. The "basic" rate applies to all cars over all roads. The "incentive" addition applies only to certain types of cars and only to roads not exempted by the Commission. And, as recognized by most of the appellants at one time or another in the *Interim Incentive* case, an added incentive factor cannot logically be determined until the basic system is established. In the meantime, the roads, the Commission, and the courts will have the benefit of experience under the new rates. During this period, the Commission is fully empowered to deal with particularized car shortages through enforcement of car

[8] See also, *e.g.*, *American Commercial Lines* v. *Louisville & N. R. Co.*, 392 U.S. 571; *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 150, 153–154; *Securities and Exchange Commission* v. *Drexel & Co.*, 348 U.S. 341, 346–347; *New York* v. *United States*, *supra*; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583–585; *New England Divisions Case*, 261 U.S. 184, 200–201.

service rules and emergency car service orders (49 U.S.C. 1(15)) which can be employed should a railroad leave cars sitting unused. In these circumstances, the Commission acted well within its discretion in concluding the long-pending per diem case without converting it into still another exploration of car supply.

There is no merit in appellants' converse contention that the Commission erred in not determining whether its time and mileage formula would have an adverse or "disincentive" effect on the national car supply. The argument is nothing more than an attempt to bring into the basic per diem proceeding by the backdoor incentive factors properly being considered under Section 1(14) in the separate pending proceedings described above.[9]

### B. THE CALCULATIONS OF OWNERSHIP COSTS

The attacks in No. 497 upon the findings and evidence dealing with the costs of ownership to be re-

[9] In fact, the new rates are not necessarily lower than existing AAR rates; if newer cars sustain even average mileage, the time-mileage system is likely to create a higher daily payment than at present. Thus, on this record it is speculative to argue that basic rates computed on a time-mileage system will have disincentive effect on the return of cars to their owners. The $12,500 car which appellants use for illustration (UP J.S. p. 11) would, if moved the average number of miles shown by the 1960 study (Ex. R–8, p. 43), incur the following comparative charges:

| Age of car | ICC time-mileage rates | AAR rates |
|---|---|---|
| 1 year | $4.85 | $4.50 |
| 10 years | 4.48 | 3.58 |
| 20 years | 3.75 | 3.58 |

turned to the creditor lines involve determinations which are peculiarly for the Commission's broad discretion. The Commission divided the cost of a car into two portions—representing the owner's actual cash investment, and the additional funds which the owner borrowed to acquire the car. The Commission authorized a before-tax return of 9% on the former and 4% on the latter, for a composite rate of 6% before taxes (332 I.C.C. at 213). The contention that the debt-equity split was not supported by the evidence was properly rejected in the court below.[12] That the formula was one not specifically suggested by any party is no ground for reversal. Cf., *Market Street R. Co.* v. *Commission*, 324 U.S. 548, 559–560; *Central Illinois Public Service Company* v. *Federal Power Commission*, 338 F. 2d 682, 685 (C.A. 7). The true context of the agency's statement as to "no evidence" (332 I.C.C. at 212, referred to in UP J.S. at p. 19) dealt with the rejected "cost of equity capital theory" and not the Commission's own finding as to rate of return. A rate of 4% on borrowed funds is not unreasonable on this record, which showed that the average rate on outstanding equipment obligations was 3.849% (332 I.C.C. at 213). Finally, if unabated inflation requires some upward modification after a fair trial, that can be done under the very terms of the order (332 I.C.C. at 230, 234, 256–257).

[12] See Ex. R-211, p. 30; Tr. 6, 8, 10, 15–16, 233, 6815–6816, 10233.

## II. THE MASSACHUSETTS APPEAL (NO. 343)

### A. THE COMMISSION'S JURISDICTION TO ADVISE AS TO PAST RATES

As detailed in our Statement, *supra*, the longstanding dispute between creditor and debtor roads has led to a number of lawsuits in the New York courts, and those courts asked the Commission's "advice" as to proper rates for the periods in dispute (see 332 I.C.C. at 181). The Commission responded in one part of its decision below. In an argument not made below, appellants now contend that the Commission lacked statutory power to "adjudicate" as to past rates (B&M J.S. 29–32). But no such issue is presented here.

The Commission explained that its findings "* * * as to the reasonableness of the rates charged in the past *are of significance only as an aid to the courts* in settling the amount of damages in the pending lawsuits" (332 I.C.C. at 183; emphasis added). It added that findings as to the past were "made pursuant to the requests of the United States District Court and the Supreme Court of the State of New York" for findings which "may be considered" by those courts (332 I.C.C. at 255). The Commission thus did not "adjudicate" anything, and it needed no "jurisdictional" authority other than the courts' requests. While the agency's advice is entitled to due respect, the courts are, nevertheless, free to accept, modify, or reject it, and the claims will be "adjudicated" by them and not by the Commission. Similarly, the parties to these suits remain free to assert whatever defenses, set-offs, or counterclaims they may have.

During the 1958 litigation of this case, there was a question as to the Commission's jurisdiction over past rates (162 F. Supp. at 293–294; 358 U.S. 68). But that question disappeared by virtue of the New York lawsuits and the requests of those courts. The Commission was clearly empowered to respond to these requests, embracing a matter within its special expertise, and its response was reviewable in the district court proceeding below. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422; *El Dorado Oil Works* v. *United States*, 328 U.S. 12. Appellants' "jurisdictional" question is thus not presented by the instant case.

B. THE PROPER RATES FOR PAST PERIODS

Appellants present a series of attacks upon various subsidiary details of the Commission's determinations as to past rates. All are directed to matters falling well within the agency's expert discretion or to the weight of evidence, and none are appropriate for review in this Court.

1. *"Repair deficiency" credit.* The lower court properly sustained the Commission's treatment of the "repair deficiency," which arises out of the fact that users frequently repair owners' cars. The Commission held that differences between sums spent and sums received under an AAR billing schedule should, in the first instance, be corrected through that schedule and not as a credit to per diem charges (332 I.C.C. at 190–194).[11] As the lower court reasoned, there is

[11] Changes can and have been made in this billing schedule. (Ex. 1630, pp. 2–8, 295; Tr. 1149–1152, 6636, 9225). As the lower court noted, appellant B&M has caused at least one such change. (B&M App. F6, fn. 4).

"nothing in the statute or in any court decision we know of requiring the Commission to treat the two as inextricably linked" (B&M App. F5–F6). In any event, as appellants concede (B&M J.S. 32), their claims for offsets against the past per diem charges can be asserted as counterclaims in the New York litigation.

2. *Mileage for the past.* It is undisputed that for past years, aside from the 1960 study figures (see p. 5, *supra*), there were no records revealing the number of miles over which any one road moved the cars of any other. Appellants contest the Commission's judgment that therefore no reliable mileage determinations could be made for the years in dispute and its determination of past rates based solely on time. The lower court, however, whose 1958 remand triggered the issue, was satisfied, stating that the "law does not demand the impossible" (B&M App. F6), and it properly declined to compel the Commission to inject a mileage element based only on "surmise" (*ibid.*).[12] Nor did this result impose any improper "burden" upon

[12] After careful exploration, the Commission rejected a method utilized by the hearing examiner—whereby mileage for past years could be estimated with what he admitted to be "limited accuracy" by projecting the 1960 studies backward and forward (332 I.C.C. at 246–247). This method would have required the assumption that the relationships between the number of foreign car miles recorded for any particular road in 1960 and the total number of foreign cars recorded for all roads that year remained constant throughout the years in dispute. It would also have assumed that all roads stood in precisely the same relationship to one another with reference to each carrier's movement of each other's cars in the past years as in 1960. The Commission found that 1960 was not so nearly representative of all other years as to warrant such projections.

the appellants. The "owner" roads, which instituted the proceeding, had the burden of proving that the existing AAR rates were just and reasonable. They failed and those rates were held not to be just and reasonable (332 I.C.C. at 254, 257). But there is no "burden" which should require the owners to produce mileage figures from non-existent records.

3. *Use of average costs.* The lower court correctly approved the Commission's use of average costs in calculating rates for past periods, noting that "[c]osts are not so dissimilar that use of an average figure would work any great injustice" (B&M App. F9). The use of national averages was entirely proper considering that the creditors, for whose benefit the advice was sought, owned some 88 percent of the national car fleet (Ex. R–181). Moreover, there was evidence showing that cars used by the appellants had values even higher than average (Exs. R–24, R–25, R–26).[13]

4. *Adjustments for inflation.* As noted earlier, the prescribed rates compensate the car owner for that portion of his funds actually invested in a car. To measure the impact of inflation upon these investments, the Commission, as an "approximation" or general guide, used a device known as the "Account No. 53 Index," which attempts to show the cost relationship between building a car in 1910–1914 and building the same car in later periods. Appellants would substitute the broad-scale Wholesale Price Index of the Bureau of Labor Statistics (B&M J.S.

[13] At one stage appellants B&M and New Haven conceded the propriety of the use of average car ownership costs (Brief of B&M and NH, April 12, 1965, p. 94; Exceptions of B&M and NH, May 9, 1966, p. 113).

37-38), which apparently would produce a lower rate. But plainly the choice of inflation indices is within the Commission's discretion.

5. *The "zone of reasonableness"*. Appellants argue that, despite the request of the New York courts for advice as to specific rates that were reasonable for specified periods, the Commission nonetheless had authority only to establish "zones" of reasonable rates and appellants can be required to pay no more than the lowest rate within each such "zone". The "zone of reasonableness" concept stems from a carrier's common law right to initiate rates in attracting traffic as against competition, *Texas & Pacific Railway Co.* v. *United States*, 289 U.S. 627, 636, and has nothing to do with per diem payments. The Commission plainly did what the courts' request asked it to do.

C. THE SUBSTITUTION OF HEARING EXAMINERS

Nine years ago, before the new hearing on remand from the Massachusetts district court began, the Commission made a substitution of hearing examiners, because the original examiner was dissatisfied with certain preliminary procedural matters. In 1962 the Commission denied various petitions filed by appellants who apparently sought re-designation of the original examiner (B&M App. G1; 318 I.C.C. 180). The Commission held that nothing in the Administrative Procedure Act precluded relief of an examiner upon his request for reasons adequate to the agency, explaining that it is often necessary to relieve an examiner for reasons other than pure disqualifica-

tion or bias. This common sense approach is essential to efficient administration. As to the claim that the second examiner had not been assigned from a rotation list, rotation is required only "so far as practicable" (5 U.S.C. (Supp. IV) 3105). Given the itinerant nature of Commission hearings, as well as the need to assign cases according to examiners' special expertise, the Commission has long since found that strict rotation is unsuitable for economical and efficient dispatch of its business (B&M App. G7).

In any event there is no conceivable claim of prejudice. Appellants concede (B&M J.S. 17) that the Commission "corrected all of the defects" of which they and the original examiner complained. Moreover, the first examiner presided only at prehearing conferences and neither heard nor received any evidence. Nor is it suggested that the new examiner was unqualified or biased.

## CONCLUSION

For the foregoing reasons, the judgments of the district courts should be affirmed.

Respectfully submitted.

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OCTOBER 1969.

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SUPREME COURT, U. S.

AUG 14 1969

JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1969

NO. ..... 480

ARIZONA CORPORATION COMMISSION, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On Appeal from The United States District Court for The District of Nebraska

## JURISDICTIONAL STATEMENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

ARIZONA CORPORATION COMMISSION, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On Appeal from the United States District Court for the District of Nebraska

## JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court for the District of Nebraska dismissing complaints to set aside an order of the Interstate Commerce Commission. Appellants are twenty-one state regulatory commissions.[1]

[1] Appellants are: in addition to the Arizona Corporation Commission: Arkansas Public Service Commission; California Public Utilities Commission; Colorado Public Service Commission; Florida Public Service Commission; Idaho Wheat Commission and Idaho Public Utilities Commission; Iowa State Commerce Commission; Kansas State Corporation Commission; Louisiana Public Service Commission; Minnesota Railroad and Warehouse Commission; Missouri Public Service Commission; Montana Board of Railroad Commissioners; Nebraska State Railway Commission; Nevada Public Service Commission; New Mexico Public Service Commission; North Dakota Public Service Commission; Oklahoma Corporation Commission; Public Utility Commissioner of Oregon; Texas Railroad Commission; Washington Utilities and Transportation Commission; and Wyoming Public Service Commission.

## OPINIONS BELOW

The Judgment of the District Court entered May 28, 1969, but not yet reported, is set forth as Appendix A.* The Memorandum Opinion of Judge Robinson is set forth as Appendix B. The concurring opinion of Judge Lay is set forth as Appendix C; and the dissenting opinion of Judge Van Pelt is set forth as Appendix D. The Commission's decision in I.C.C. Docket Nos. 31358, 33145, and 34405, dated January 17, 1968, is reported at 332 I.C.C. 176, and is set forth as Appendix E.

## JURISDICTION

The appeal herein is from a final judgment of a three-judge United States District Court for the District of Nebraska, constituted under 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325 to review the order of the Interstate Commerce Commission in its Docket Nos. 31358, 33145, and 34405. The final judgment of the three-judge court here appealed from was entered May 28, 1969. These Appellants filed their Notice of Appeal on June 27, 1969. This Court has jurisdiction to hear this direct appeal, under 28 U. S. C. §§1253 and 2101(b). *Public Service Commission of Utah v. United States*, 356 U. S. 421 (1958); *New York v. United States*, 331 U. S. 284 (1947).

## STATUTE INVOLVED

Section 1(14) (a) of the Interstate Commerce Act, as amended in 1966, provides (49 U.S.C. §1(14)(a)):

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint,

* These Appendices are presented separately, bound as a Joint Appendix to the Jurisdictional Statements of these Appellants and the railroad appellants, Union Pacific Railroad Company, et al.

establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply; and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest."

## QUESTION PRESENTED

The 1966 Congressional amendment to Section 1(14)-(a) of the Interstate Commerce Act states that the Com-

mission, in fixing compensation to be paid for the use of any freight car, shall consider "factors affecting the adequacy of the national freight car supply" and prescribe car hire rates "on the basis of such consideration." The question here presented is whether the Commission acted contrary to the statute when it prescribed new rates for the use of freight cars without considering the effect of those new rates upon the freight car supply.

## STATEMENT

In this proceeding, twenty-one state regulatory commissions (hereinafter referred to as the States) filed complaints in the District Court to set aside an order of the Interstate Commerce Commission which would drastically reduce the daily rental rate for railroad freight cars. The reason for the action of the States in the Court below, and for this appeal, is that the maintenance of an adequate level of per diem rental rates is vitally necessary to the economy of our states.

Car rental rates have a vital impact upon the willingness of the railroads to build an adequate number of freight cars to serve their shippers and upon the efficiency with which such cars are used. Low rental rates make it cheaper for railroads to rent the cars of other carriers than to build their own. Likewise, low rental rates per day make it cheaper for a renting carrier to hold a car idle, and thus reduce the incentive to return that car to its owner. These two factors—the number of freight cars in service, and the efficiency with which they are used—determine whether or not the nation's

car supply will be adequate to serve the needs of the nation's shippers.

The economies of our states have been hampered by recurring car shortages of increasing magnitude. Our regulatory commissions have been besieged with complaints from shippers that they are unable to obtain cars when needed. Farmers have experienced "blocked elevators"—elevators which are full of grain because no boxcars are available, and have therefore been unable to sell more grain. Lumbermen often find it impossible to ship their products to market.

Producers of goods other than basic commodities have found themselves similarly handicapped in their efforts to reach consumer markets. Manufactured products must be placed in storage because cars are not available for shipment. As a result, handling costs have increased, and as storage capacity nears exhaustion, production has had to be curtailed. Such bottlenecks adversely affect the economy at all levels since when transportation becomes unavailable, producers are compelled to stop taking orders, and must run the risk that orders already taken will have to be cancelled if shipping schedules cannot be met. When mills shut down, employees are forced out of work. In these ways, the freight car shortage depresses the level of economic output and development throughout the areas affected.

In recent years, the shortage of freight cars has grown steadily worse. While our national economy and transportation requirements have burgeoned, our national freight car supply has shriveled. In 1926, total freight

car ownership (excluding refrigerator cars) was 2,427,026. In 1945, it was 1,744,179, about 72% of the 1926 figure. During the first five years of the 1960's, the figures continued to show a steady decline. [Hearings on H.R. 2230, H.R. 7165 and S. 1098 before the Committee on Interstate and Foreign Commerce, House of Representatives, 89th Cong., 1st Sess., (hereinafter cited as "House Committee Hearings"), p. 102]:

January 1, 1961—1,636,695
January 1, 1962—1,579,065
January 1, 1963—1,523,080
January 1, 1964—1,482,122
January 1, 1965—1,457,074

The Chairman of the Interstate Commerce Commission reported to the Senate Committee on Commerce, on May 13, 1969, as follows:

> "Up to 1960, daily shortages of [plain box] cars were on the decline. Since 1960, however, shortages have increased as the ownership of plain boxcars has declined. *Since 1965, average daily reported shortages have increased sharply.* The 1966 daily average shortages for a four-month study period ranged from 3,312 to 13,066. In 1967, reported daily average shortages of all types of cars ranged from 1,428 to 7,970, while in 1968 . . . shortages ranged from 2,810 to 16,376. *This year,* reported daily shortages range from *4,626 on January 11 to a high of 18,480* on March 29." (Statement of Virginia Mae Brown, Chairman, Interstate Commerce Commission, on Railroad Freight Car Shortages, Before the Committee on Commerce, United States Senate, May 13, 1969, p. 13; emphasis supplied).

One reason for the car shortages is that, having little incentive to return freight cars to their owners, the railroad industry has used those cars inefficiently and permitted them to remain idle on an average of over 300 days out of every year. 80 I.C.C. Ann. Rep. 92 (1966). Another reason is that given such inefficient utilization of cars and given the fact that even when cars are in use they are often being used at low rentals on the lines of other railroads, many railroads simply have not replaced as many cars as have become unusable or obsolete. Instead, they have chosen to rent the cars of other carriers. In both respects, the increasing magnitude of car shortages in recent years has been directly related to the low level of per diem rates in effect.

Representatives of the shipping public and the public regulatory authorities of our states have supported legislative efforts to improve car supply for many years. Specifically, the states were in the forefront of efforts to amend the Interstate Commerce Act to provide that the Commission, in fixing car hire rates, should do so in such a way as to promote car supply. Bills to achieve this purpose were introduced in Congress in 1951, 1952, 1953, 1956, 1957, 1958, 1959, 1961 and 1963; but none was successful. And, as the years passed, car supply continued to deteriorate.

In 1965, a major new attempt to amend Section 1(14)(a) of the Act was initiated. Hearings were held in several of the most critically affected areas. Representatives of many of our states, including Senators,

Congressmen, members of state regulatory commissions[8] and large numbers of shippers and shipper groups urged Congress to pass the bill (S. 1098). The bill, as reported out of the House Committee on Interstate and Foreign Commerce, passed the House on May 12, 1966 and the Senate on May 17, 1966. It was signed into law May 26, 1966, with a provision that it become effective September 1, 1966.

As the House Committee stated (House Comm. on Interstate and Foreign Commerce, National Freight Car Shortage, H.R. Rep. No. 1183, 89th Cong., 1st Sess., 2 (1965)):

> "The purpose of the bill is to secure alleviation of the recurring national shortages of railroad freight cars.
>
> "This purpose is to be accomplished by authorizing the Interstate Commerce Commission in its setting of the rates of compensation to be paid for the use of any type of freight car to include such elements as in the Commission's judgment will provide just and reasonable compensation to freight car owners, *contribute to sound car service practices (including efficient utilization and distribution of cars)*, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense."
>
> * * *
>
> "There is no need to set forth statistics regarding

[8] See Statement of Jonel C. Hill, Public Utility Commissioner, State of Oregon, House Committee Hearings, p. 181; Letter of Richard H Larson, Nebraska State Railway Commissioner, *Id.*, p. 269; Statement of Patrick D. Sutherland, Washington State Utilities and Transportation Commission, Hearings on S. 179 and S. 1098 before the Subcomm. on Freight Car Shortage of the Senate Comm. on Commerce, 89th Cong., 1st Sess., ser. 89-23, at 56 (1965); Statement of John C. Woelk, Kansas Corporation Commission, *Id.*; p. 385; Letter of Joseph J. Brown, Nebraska State Ry. Commission, *Id.*, p. 274.

the amount or the nature of the shortages or to resolve the conflicting interpretations of those statistics that are given by those concerned with the movement of cars. There is not a single Member of the Congress in the past 20 years who at some time or other has not had brought to his attention the discouraging situation which faces the shippers in his area, and indeed for that matter of the railroads of his area with regard to the availability of cars.

"*Something must be done to meet the needs of the shippers and of the public and of the country.*" (Emphasis added.)

Twenty months after the passage of this amendment, the Commission handed down its order in Docket Nos. 31358, 33145 and 34405 now under review.

The Commission proceeding was conducted to determine the proper compensation for all types of cars for which the railroads were charging per diem rates set by agreement of the Association of American Railroads. The two basic questions in the proceeding were, first, what the level of total compensation for these freight cars should be; and, second, the way in which that compensation should be structured. With respect to the latter question, the rental rates for these freight cars had been entirely on a daily (per diem) basis for generations. The reason for the use of a daily charge instead of a mileage charge was explained in *Palmer v. United States*, 75 F. Supp. 63, 68 (D.D.C. 1947):

"Originally car-hire charges were upon a mileage basis. No rental was paid for a car which was standing still. Therefore, there was no incentive for the hiring road to move the car or to return it. The re-

sults were such as to require a change, and a charge upon a time basis was instituted.

"Obviously, any charge upon a time basis furnishes an incentive for prompt return of the property. When a contractor rents a bulldozer by the day, he has an incentive to use it promptly and return it; the same is true in the case of a book taken from a lending library at a daily charge. The penalty or incentive characteristic of the per diem is merely an inherent quality of a charge based upon time."

This same basis for use of a daily charge was established by the evidence in the instant proceding before the Commission. That evidence showed that a change from a daily rate to a mileage rate, or to a combination of a daily rate and a mileage rate (the so-called time mileage proposal) would have a seriously detrimental effect on car utilization.[8]

The Commission did not consider this evidence, which was uncontroverted in the record, but held instead that this evidence of the deleterious effect of time mileage rates on car supply was irrelevant, stating (332 I.C.C. at 223; App. E, p. 86a):

"Proponents of rates measured solely by the number of days the user retains the car contend that they benefit therefrom in encouraging the movement of cars and assert that this method most effectively aids the national policy of improving car supply and service . . . *Secondary results, however beneficial*, cannot be transformed into a principle to govern the determination of the rates in this case." (Emphasis supplied)

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[8] See Exhibits R-54; R-98, p. 13; R-119, p. 14; R-120, pp. 5-7; R-146, p. 7, and R-154, pp. 10, 27.

The Commission thereupon prescribed a structure of rates in which the per diem component would be drastically reduced (332 I.C.C. at 185, 242; App. 1, pp. 48a, 105a). For example, on the oldest and cheapest cars, the daily charge which is now set at $2.16 would be reduced to 63 cents; while on the most expensive cars, the daily charge now fixed at $12.18 would be reduced to $10.22.

Because of the square inconsistency between what the Commission did and what Congress told it to do, and because of the damage which implementation of the Commission's order would cause the shippers in our states, we appealed to the three-judge District Court for the District of Nebraska to set the order aside. The basic legal issue was whether the Commission was correct in disregarding the impact of time/mileage rates on freight car supply on the theory that such consideration was irrelevant in the face of the statutory directive of Section 1(14)(a) that:

> "*In fixing such compensation* to be paid for the use of any type of freight car, *the commission shall give consideration* to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, *and shall, on the basis of such consideration*, determine . . . [what the rates shall be]." (Emphasis supplied)

The District Court, on May 27, 1969, rendered its Judgment dismissing our complaint. (App. A, p. 1a). The Court split three ways on the question of whether the Commission should have considered car supply. Judge Robinson's opinion held "that the Commission properly rejected a consideration of car supply factors in the

computation of basic per diem" (App. B, p. 26a), holding that the requirement of Section 1(14)(a) had been satisfied by the Commission's action in an earlier proceeding (App. B, p. 20a):

> "The Commission did give consideration to car supply factors before deciding to prescribe only a basic per diem rate in the present order. Less than a month after the statute was amended, the Commission instituted a proceeding to determine appropriate incentive per diem charges. *Incentive Per Diem Charges, supra.* All railroads in the United States were made parties to the *Incentive* proceeding. The Commission gave full consideration to all factors specified in the amendment and concluded that the evidence did not warrant the imposition of an incentive charge at this time."

The *Incentive Per Diem Charges* case cited by Judge Robinson was a proceeding in which the Commission had considered whether it should increase the existing per diem rate to provide an added incentive to more efficient utilization. 332 I.C.C. 11 (1967). In that case, no party proposed, and the Commission did not consider any proposal, that freight car rates should be changed from a daily charge to a time/mileage basis or that the present per diem rates should be reduced for any reason. Since the Commission could not and did not consider in the *Incentive Per Diem Charges* case the serious adverse impact that a time/mileage rate with reduced daily charges would have on freight car supply, Judge Robinson's opinion is simply not responsive to the statutory question presented by the States.

Judge Lay concurred on the theory that the Commis-

sion had "substantially complied" with the statute, though he added (App. C, p. 32a): "I have difficulty in rationalizing that the Commission has in fact made a deliberate choice as directed."

Judge Van Pelt dissented on the ground that the Commission had promulgated a rate "which admittedly has been established without consideration of the factors which the Congress said shall be considered," and that in his opinion the order should have been set aside and remanded for the Commission "to make the determination in this proceeding in the manner the Congress intended." (App. D, pp. 35a-36a).

## THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this appeal is vitally important to these Appellants because of the effect which the Commission's order will have on the economies of our states and the welfare of the entire country. The shippers and receivers of our states have been seriously burdened in the past because of car shortages (*supra*, pp. 5 & 8), and the order of the Commission which is the subject of this appeal would seriously aggravate the car supply problem by reducing the daily rate for the use of a freight car.

We do not ask this Court to decide what impact the prescription of time/mileage rates would have on car supply. That was—and still is—a matter for which the Commission, in the exercise of its expertise, is responsible. In the 1966 amendment of Section 1(14)(a), Congress directed the Commission to give consideration to

car supply "in fixing such compensation to be paid for the use of any type of freight car;" and to make matters doubly clear it also provided that compensation should be determined "on the basis of such consideration." The legislative history emphasizes the critically important relationship between per diem rates and car supply, and Congress clearly intended that the Commission comply with the express language of the statute requiring that, in issuing any order fixing rates for the use of freight cars, car supply factors be given full consideration. (House Report No. 1183, *supra*, p. 8)

Yet the Commission has here prescribed car hire rates which would substantially *reduce* the per diem component. (*supra*, p. 11). Furthermore, it is conceded by the Commission and by the Court below that the order reducing per diem rates did not reflect any consideration of the effect that the prescribed time/mileage basis would have on car supply. Therefore, the order is in direct conflict with the specific directive of the statute.

The opinions of Judge Robinson and Judge Lay rely, in different ways, on the fact that the Commission is conducting a separate proceeding—the so-called *Incentive Per Diem Charges* proceeding, *Ex Parte 252 Sub. No. 1*. (App. B, p. 20a; App. C., p. 33a). But the new car hire rates on a time/mileage basis, with substantial reduction in the daily rates, have been prescribed for application *immediately*—not sometime in the future in conjunction with whatever additional elements may be prescribed in some future order in the *Incentive* case. It was precisely this kind of change to a new time/mileage

basis of car hire rates that Congress expressly provided must be preceded by, and based upon, consideration of, the total public interest in adequate car supply.

Consideration of the impact of new time mileage rates is of critical importance, when, as the Commission has recently recognized, car shortages have now become so severe as to constitute an emergency. On April 17, 1969, the Commission entered an order finding:

> "That there are acute shortages of freight cars throughout the country; that certain carriers are unable to furnish an adequate supply of freight cars to shippers located on their lines; that these shortages of freight cars are impeding the movement of many commodities; . . . that an emergency exists requiring immediate action . . . ." (I.C.C. Service Order No. 1023)

In light of this emergency, the Commission ordered shippers and receivers to pay up to $50.00 per day for detention of a freight car beyond specified time limits.[6] On June 5, 1969, the Commission denied reconsideration of its order because it "was predicated on a finding of an extreme shortage of freight cars throughout the nation, which constitutes an emergency . . . , [and] that this emergency still exists . . . ." Yet, at the same time that the Commission has increased the daily cost of holding cars idle to shippers and receivers, the Commission's order which is the subject of this appeal would reduce the daily cost to railroads which rent those cars. Given

[6] The shipper can avoid such a charge only by returning the car to the railroad. But once the car is in the possession of the railroad, the regular per diem rate applies no matter how long the railroad holds the car before returning it to its owner.

the fact, as the Commission has found, that car shortages have already assumed emergency proportions, this appeal from an order which would make the car supply problem even worse presents a question which is clearly substantial and should be heard by this Court.

The questions raised by this appeal are important for a further reason—apart from the immediate adverse impact which the Commission's order will have on car supply. The 1966 amendment to Section 1(14)(a) was the culmination of some fifteen years of concerted effort by the States and others to obtain definitive legislative authorization of additional power for the Interstate Commerce Commission to deal with the problem of car shortage. The Commission has responded to the passage of that amendment by giving it an unwarrantedly restrictive interpretation which is at war with the words of the amendment and the Congressional intent. The Commission has construed a statute which directs it to consider car supply in such a way as to preclude it from considering car supply in this so-called "basic per diem proceeding," although "basic per diem" undeniably falls within the statutory category of "compensation to be paid for the use of any type of freight car." Moreover, the Commission has interpreted the statute as preventing it from even considering the effect its orders will have on car supply, such as the adverse impact of time/mileage on car utilization. It can prescribe an incentive additive "only if the evidence warrants a determination that an inadequacy exists," *Incentive Per Diem Charges*, 332 I.C.C. 11, 13 (1967); but it cannot take steps to prevent

the inadequacy from coming into existence. The Commission thus reads Section 1(14)(a) as authorizing a pound of cure in some future proceeding but simultaneously prohibiting even the consideration of an ounce of prevention now.

The three-way division within the three-judge District Court below does not resolve the issues raised by the Commission's construction of the statute. While one judge agreed with the Commission's interpretation (App. B) the dissenting judge concluded that the time/mileage basis was established "without consideration of the factors which the Congress said shall be considered." (App. D, p. 35a) The decisive opinion of Judge Lay, far from resolving the conflict, only serves to obscure it since he resolved the matter by suggesting that although the Commission had not "made a deliberate choice as directed," it had nonetheless "substantially complied with the mandate of the statute." (App. C, p. 32a).

In light of the effort which went into passage of the 1966 amendment of Section 1(14)(a), the resulting Congressional direction of responsibility to the Commission for consideration of car supply matters, the Commission's patent misreading of the statute, and the lack of any clear agreement on the part of the three-judge court below as to the proper interpretation of that Section, the public interest requires that this important statutory issue be resolved by this Court.

## CONCLUSION

For these reasons, this appeal presents a substantial question in the administration of the Interstate Commerce Act, and probable jurisdiction should be noted.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1969

ARIZONA CORPORATION COMMISSION, *et al.*,
*Appellants,*
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
*Appellees.*

No. 480

UNION PACIFIC RAILROAD COMPANY, *et al.*,
*Appellants,*
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
*Appellees.*

No.

On Appeal from the United States District Court for the District of Nebraska

## JOINT APPENDIX TO JURISDICTIONAL STATEMENTS

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**Appendix A**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

**UNION PACIFIC RAILROAD COMPANY, et al.,**
**Plaintiffs**

**VS.**

**UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,**
**Defendants**

**CIVIL 02981**
**JUDGMENT**

THIS CAUSE came on for final hearing on the complaint herein praying for a judgment setting aside the order of the Interstate Commerce Commission entered January 17, 1968. Pursuant to Section 2284[1], Title 28, United States Code, the Honorable Donald P. Lay, United States Circuit Judge, and the Honorable Richard E. Robinson, Chief Judge of the United States District Court for the District of Nebraska, were designated to hear and determine this cause with the Honorable Robert Van Pelt, United States District Judge for the District of Nebraska.

The Court having heard the arguments of counsel and the briefs submitted, and it appearing to the Court that the complaint should be dismissed for the reasons set forth in the separate memorandum of the Court heretofore filed herein,

IT IS ORDERED, ADJUDGED and DECREED that the plaintiffs' complaint should be and the same hereby is dismissed.

Dated this 27th day of May, 1969.

/s/ Donald P. Lay
United States Circuit Judge

/s/ Richard E. Robinson
Chief Judge,
United States District Court

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | |
|---|---|
| **UNION PACIFIC RAILROAD COMPANY, et al.,** **Plaintiffs** | |
| **VS.** | **CIVIL 02981** |
| **UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,** **Defendants** | |

**MEMORANDUM**

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Before LAY, Circuit Judge, and ROBINSON and VAN PELT, District Judges.

ROBINSON, District Judge.

This is an action to set aside an order of the Interstate Commerce Commission prescribing rental rates to be paid by railroads for the use of freight cars owned by another railroad. The Commission's order dated January 17, 1968, was entered in its Dockets No. 31358, 33145 and 34405, *Chicago Burlington & Quincy R. Co. et al. v. New York, Susquehanna & Western Railroad Co. et al.*, 332 I.C.C. 176. The plaintiff railroads seek relief because of alleged violations of the Interstate Commerce Act and the Administrative Procedure Act.

This Court has jurisdiction under the statutory authority provided in 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, inclusive, and 5 U.S.C. §§ 701-706, inclusive. The venue

requirements of 28 U.S.C. § 1398 have been observed as the principal offices of one of the plaintiffs, Union Pacific Railroad Company, are located in the District of Nebraska.

The order of the Commission prescribing the basis of the rates to be paid by railroads for the use of freight cars owned by another railroad was to take effect on October 1, 1968. The date was extended to November 15, 1968, by an order of the Commission. On November 7, 1968, this Court entered an order enjoining the enforcement of the Commission's order during the pendency of this litigation.

For more than 60 years railroads have paid for the use of another railroad's freight cars on the basis of a per diem rate. The level of this rate has been set by the Association of American Railroads or its predecessor organizations. Prior to 1953 the determination of the per diem rate was voluntarily accepted by the railroads. In that year, however, when the per diem rate was raised from $2.00 to $2.40, several Eastern railroads refused to pay the increased amount. They have continued to use the cars of other railroads, but insist on per diem rates which are less than are being paid and collected by all the major railroads.

A number of railroads filed a complaint with the Commission against the dissenting group of railroads, seeking a declaration that the new rates of the Association of American Railroads were just and reasonable and an order requiring all railroads to observe them. Following the filing of the complaint with the Commission, more than 100 private lawsuits were initiated in the United States District Court for the Southern District of New York. Two actions were filed in the New York State Courts. These suits were brought to collect from the dissenting railroads the increased amounts of per diem which they have refused to pay. A few of the suits have been settled, but most have

been held in abeyance pending a decision by the Commission on per diem rates.

In 1955 the Commission issued its decision that the Association of American Railroads per diem rates [$1.75 and $2.00 per day during different past periods and the then existing $2.40 per day] were just and reasonable and that uniform per diem rates for all railroads were required. *Chicago, R. & Q. R. Co. v. New York, S. & W. R. Co.*, 297 I.C.C. 291 [1955].

On review, however, the Commission's decision was reversed by the United States District Court for the District of Massachusetts. With specific reference to the issues relevant here, the court found: [1] a need to more accurately determine car-line costs; [2] a need to collect data and to consider mileage as a possible second factor with time for allocation of per diem costs; [3] an error in using car age as a factor in computing car utilization; and [4] a possible impropriety in the use of reproduction value in place of ledger value in computing depreciation and return on investment for per diem purposes. *Boston & Maine R. Co. v. United States*, 358 U.S. 68 [1958].

The Supreme Court noted that the reviewing court "pointed out that the Commission had erred in considering the repairs, depreciation and 'car day divisor' components of the per diem," but that "it rested [its] decision on the Commission's summary rejections of an alternative method of compensation, which would introduce a mileage factor into the per diem, advocated by certain of the terminal roads." The Supreme Court also noted that the Commission had indicated that further investigation and more detailed findings would be required to comply with the reviewing court's opinion, and recognized that "[s]hould such proceedings lead the Commission to reconsider its estimate of

involved in owning and maintaining freight cars, including a fair return on value [which return shall be fixed at such level as in the Commission's judgment will encourage the acquisition and maintenance or an adequate car fleet] or ***." In the House substitute the language became: "determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such types of freight car, including a fair return on value or ***." The word "solely" was inserted and the parenthetical statement of the original Senate Bill was eliminated. The parenthetical language would have broadened the Commission's power to set compensation in the ordinary sense by including an incentive element, which the insertion in the House bill of the word "solely" clearly precluded.

The alternative power relative to providing incentive compensation was also described differently in the two versions. In the original Senate bill the language read: "or should be computed on the basis of elements reflecting the value of use of freight cars, or upon such other basis or combination of bases as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." In the House substitute version, this language was changed to read: "or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices [including efficient utilization and distribution of cars] and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense."

It is clear that in the original Senate version the Commission was given the choice of using ordinary cost elements with a "return" factor described to encourage improvement in the car supply or a completely different basis described as "value of use or such basis or combination of bases as the Commission might choose." In the form the bill was passed by the Senate the Commission would have authority to select the basis to be used, subject only to the defined objectives. The House substitute version left undisturbed the standards under existing law by which compensation is to be generally fixed for all cars and limited the determination and application of the incentive element as an additive to the basic rates on specific types of cars found to be in short supply.

The legislative history supports the foregoing analysis. House Report No. 1283 on S. 1098, as amended, contains this statement:

> "If the committee amendment is enacted, the Commission in fixing compensation under existing Section 1[14][a] of the Interstate Commerce Act will be empowered, in the same proceeding, to go beyond the basis of elements of ownership expense in computing compensation. Where warranted consideration may be given as to whether such compensation should be increased by an incentive element or elements which will encourage acquisition and maintenance of an adequate car supply. This will be a discretionary power but the Commission will not be allowed to make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate."

Congressman Staggers, Chairman of the House Commerce Committee and floor manager of the bill, gave the following explanation of the Committee substitute:

> "The committee amendment to the Senate bill sharpens up the authority given to, and the standards to be em-

ployed by, the Commission in determining these per diem charges.

"The amendment first restates in clear language what the courts have held to be the limitations of the law as it is now written. The commission in establishing the compensation to be paid under terms of any contract or arrangement for the use of a type freight car shall compute this compensation on the basis of arrangements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value.

* * *

"Second the amendment gives the Commission the discretionary power to increase this compensation by an incentive element to encourage the acquisition of an adequate supply of freight cars but it gives such power only by type of freight car, and the Commission is not allowed to make any incentive element applicable to any type of freight car, the supply of which the Commission finds too adequate.

* * *

"In the third place, the committee amendment provides that the Commission would be empowered in its discretion to exempt from the incentive element provision any group of carriers where the Commission finds such exemption to be in the national interest. This provision enables the Commission to make exemptions from paying an incentive element by class of carrier, and permits the Commission to consider the several factors specifically authorized in the Senate bill.

"The Committee amendment strikes the provision in the Senate bill which would have allowed the Commission to consider the element of value of use of the freight car as the committee was not at all in sympathy with this proposal nor believed that it was workable.

"Determination of the value of use of the car; namely, what the owning road might have received in terms of revenue from the car had it had the car on its own line

> instead of being on a foreign carrier is so conjectural and questionable as to be impracticable and essentially is an approach to the problem through penalties rather than through incentive." 112 Cong. Record 9945-9946.

Congressman Springer, also a member of the House Commerce Committee, emphasized the significance of the substitute language:

> "The Senate in 1965 passed out a bill. It is the same bill that your committee brings to you today and we are not going to quarrel with what the other body did on this matter. We, I think, today can work out our differences on this when we go to conference.
>
> "If some of you will look at the bill, S. 1098, that was the Senate bill that we considered. We added a committee amendment and rewrote a good part of that into what is the House version—you will see that we made some really important changes. The Senate passed that bill last year and we passed our version of S. 1098 on October 20, 1965." 112 Cong. Record 9947.

It is quite clear that while the Senate Commerce Committee originally intended to make its incentive bill applicable to all car types and to change the existing basis for determining basic per diem compensation, this proposal was rejected by the House and never became law. There was no conference on the variances between the Senate and House passed bills. The Senate agreed to the House amendments so the bill in the form passed by the House prevailed. Our reading of that language and its legislative history leads us to conclude that, while providing incentive additives for freight cars, the Congress reconfirmed the principle of no more than compensation per diem for the car fleet generally. The additives were restricted to those car types the Commission may find to be needed and in short supply.

The plaintiff railroads further contend that the Commission should have reopened the Dockets No. 31358 and 33145 proceeding and considered car supply factors there rather than in a separate proceeding. We find no requirement or reason compelling such action. We have already observed that such consideration would not have changed the basic per diem rates prescribed since they must rest on cost without incentive factors. Moreover, when the amendment to Section 1[14][a] of the Interstate Commerce Act was passed, the basic per diem proceeding had been pending before the Commission for more than 13 years. The Commission and the railroads had spent nearly four years in refixing [*sic*] car costs and providing time and mileage separations following the ruling in *Boston & Maine R. Co.* v. *United States*, supra. The dispute over basic per diem rates—applicable to all cars—was on the threshold of decision.

The Commission did give consideration to car supply factors before deciding to prescribe only a basic per diem rate in the present order. Less than a month after the statute was amended, the Commission instituted a proceeding to determine appropriate incentive per diem charges. *Incentive Per Diem Charges*, supra. All railroads in the United States were made parties to the *Incentive* proceeding. The Commission gave full consideration to all factors specified in the amendment and concluded that the evidence did not warrant the imposition of an incentive charge at this time. There was no question that the proceeding was initiated in response to the passage of the amendment. The Commission stated this clearly:

> "Public Law 89-430 of the 89th Congress amended section 1[14][a] of the Interstate Commerce Act by adding a provision which requires us in exercising our authority to fix compensation to be paid for the use

> of any freight car not owned by the carrier using it, to give consideration to the national level of ownership or such type of freight car and to other factors affecting the adequacy of the national freight car supply and, on the basis of such consideration, determine whether compensation computed solely on the basis of elements of ownership expense should be increased by an incentive element. This investigation was instituted on our own motion on June 23, 1966 to *determine whether information presently available warranted the establishment of an incentive element increase on an interim basis, to apply pending* further study and investigation. [footnote omitted] [emphasis added]." 332 I.C.C. 11 p. 12.

After discussing the evidence adduced and the representations filed by the parties, the Commission concluded:

> "Despite participation by 289 of the Nation's railroads, the investigation produced no reliable information respecting the quantum of interim incentive charge necessary to meet the statutory standards and we conclude that the information necessary to this decision is not *presently* available. Conclusions in this area must rest upon consideration of economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program. They cannot be founded in conjecture and this Commission will not risk the stability and effectiveness of the railroad industry by exercising its authority capriciously." 332 I.C.C. 11, pp. 16-17.

Further investigation in the incentive per diem proceeding is in process. As the Commission noted:

> "The Commission therefore has embarked on an investigatory-research program which will use sampling procedures developed and administered by our staff to provide current data on valid car orders and the available supply of operative cars to meet actual needs.

> Other studies will involve financial and investment analysis relevant to the quantum of the incentive charge. In addition, plans have been made in cooperation with the Department of Transportation for development of standards and specifications for data systems which will provide information as to the manner and volume in which commodities flow in commerce. This will include a detailed survey of user requirements for data covering, among many other factors, equipment used, routes, origins, destinations, stations, distances, rate groups and commodities. We also note that many of the respondents individually are engaged in market and traffic studies which, together with data accumulated by the Association of American Railroads and the Association of Short Line Railroads, can be expected to produce relevant information." 332 I.C.C. 11, p. 18.

The use of a separate proceeding for an incentive per diem inquiry is reasonable and constitutes an appropriate means of implementing the statutory amendment. The amendment does not specify a joint hearing. The two determinations involve collections of different data and evaluations by different statutory standards. The application of the compensatory per diem rate is to all cars, therefore involving all car owners and all car users; the application of incentive per diem limited to cars found to be in short supply affects less than all owners and users. The Commission found in its interim report in the *Incentive* proceeding that the statistical information necessary for a meaningful decision does not presently exist and must be compiled through the efforts of the government and the railroads. The information on which it would make a decision on basic per diem, on the other hand, was already assembled. The basic per diem issue had been pending for an enormous period of time and the outcome of numerous private lawsuits was dependent upon its resolution. To

have reopened the basic per diem proceeding necessarily would have delayed such a decision. Under such circumstances, the Commission's decision to issue its basic per diem decision without awaiting the completion of investigation of incentive per diem, which bears no direct relation to its prescription of basic per diem, was reasonable and appropriate. The separate proceedings method in any event is not an abuse of administrative discretion. Cr. [*sic*], *American Commercial Lines* v. *Louisville & Danville R. Co.* [*sic*], 392 U.S. 571 [1968].

It is appropriate to indicate that the Congress was aware that a determination of incentive charges was likely to require a lengthy Commission proceeding. There is nothing in the legislative history which suggests that the Congress intended to prohibit the Commission from carrying out its responsibilities in the area of basic per diem until it had completed the *Incentive* proceeding.

Furthermore, when the Commission instituted the *Incentive* proceeding following the enactment of the amendment, many of the plaintiff railroads urged that no decision be reached until the Commission had first prescribed the basic per diem rates. At that time at least there was little question among some of the plaintiff railroads that the basic per diem rate should be decided first.

The Congressional purpose is accomplished if the Commission in setting per diem rates, has considered car supply factors by types of cars and, to the extent indicated by those considerations, it exercises its discretionary power to add an incentive per diem to the basic per diem charge. Such consideration may be contemporaneous or, because of the need for extended additional investigation, may follow the determination and prescription of the basic per diem rates. Such consideration may occur in the same proceeding

in which the basic per diem rates are being measured and prescribed or, because of the different statutory standards employed, may occur in a different proceeding. The Commission found persuasive reasons to issue its basic per diem report and order now and to continue its investigation in a separate incentive proceeding. The Commission's approach to this complex and long pending problem is an appropriate exercise of its discretion which this Court should not disturb.

The plaintiff railroads challenged the Commission's resolution of two accounting issues. The Commission found that per diem rates should reflect both time and mileage factors as opposed to a time factor alone and that the cost base of a car, upon which the per diem is computed, should be determined by a formula which provides different treatment for those elements of expense actually incurred by the owner at the time of purchase and those elements reflecting deferred expenses incurred through borrowing. The plaintiffs also contend that certain findings of the Commission are not supported by any evidence.

Per diem has for years been based solely upon the number of days a car was used by a railroad, without regard to the mileage travelled by the car during those days. This method of computing per diem was criticized in *Boston & Maine R. Co.* v. *United States*, supra. On remand, an extensive record was compiled. The Commission concluded that a formula should be presented under which "per diem rates shall be separately calculated, assessed and paid with respect to the number of days cars are held on time [*sic*] and with respect to the number of miles such cars are moved by users in time-haul [*sic*] service." *Chicago B. & Q. R.R. Co.* v. *New York S. & Western R. Co.*, supra, p. 231. The Commission found that 50 percent of the annual repair and maintenance costs should be distributed among car users in

relation to line-haul miles over which they move such cars and 40 percent of the loss in value is allocated to the effect of line-haul mileage and should be so distributed among car users, with the remainder in both instances assigned to time. The time and mileage rates prescribed by the Commission reflected these separations.

The plaintiff railroads do not dispute the Commission's findings that the time and mileage rates prescribed are necessary to effect equitable distribution of car ownership costs among car users, but contend that such rates, adopted without regard to the incentive elements of the amendment to Section 1[14][a] of the Interstate Commerce Act make the car supply problem more severe. In other words, their objection to the Commission's decision is that it did not prescribe rates with a view towards increasing the car supply.

This Court has previously observed that the function of basic per diem is to compensate the owner of a car for the expenses of ownership and maintenance. Car supply factors have no relevance to the computation of such per diem. The Commission's findings that both time and mileage factors should be taken into consideration in the computation of basic per diem and the amount of such ownership costs which should be attributed to each factor are fully supported by the record and represent a sound exercise of its administrative function.

The plaintiff railroads placed great stress on the argument that the effect of the Commission's order prescribing time/mileage rates would defeat the Congressional purpose in passing the amendment because it would reduce substantially the rate which a car using railroad is required to pay to hold a car on its sidings inasmuch as the time portion of the time/mileage rates are [*sic*] less than the present

time only rates. Two relevant considerations come into play in this regard. An incentive per diem may be added to those car types found to be in short supply when the information necessary to make such a finding is available. And, short of that determination, if any railroad is in fact leaving cars sitting unused on a siding, the Commission has ample power under Section 15[1] [*sic*] of the Interstate Commerce Act to issue a car service order, requiring the particular railroad to send the cars where they are needed. This power has been exercised by the Commission for many years, and, as noted earlier, a proceeding is now being conducted to investigate possible means of making the car service powers an even more effective tool to achieve better utilization of the existing freight car supply.

We therefore consider that the Commission properly rejected a consideration of car supply factors in the computation of basic per diem. Furthermore, in finding that a reasonable detemination of car ownership costs required payment by all railroads of rates on a time and mileage basis it exercised a judgment well within its discretion which should not be disturbed.

The plaintiff railroads object to the Commission's determination of a second accounting issue, its decision to reject a reproduction cost value base for cars and to set the rental rate level without giving consideration to the effect its choice of cost base would have on car supply. The plaintiff railroads proposed a computation of depreciation, not of incurred car cost, but based on the present cost of replacement of the car. They also proposed that their return on investment should be computed on the same replacement cost new, depreciated to date.

The Commission's limitation under the statutory amendment has been discussed in previous portions of this Memo-

randum. In prescribing the basic per diem charge the Commission may only compensate the owner of the car for ownership and maintenance costs, including a fair return on value.

The Commission noted that the Congress rejected a proposal to create a new "value of use" standard for basic per diem rates. The amendment made no change in the statutory standard for determining basic per diem. The Commission found that in defining the present basis for determining basic per diem rates as including "a fair return on value" the Congress did not define "value" as meaning reproduction cost-new rather than ledger value or present value. *Chicago B. & Q. R. Co.* v. *New York S. & Western Railroad Co.* supra, p. 202.

However, while rejecting the use of reproduction cost as the base for calculation of depreciation and interest, the Commission did find "that the consideration of fair and reasonable per diem charges under modern conditions does require an allowance to car owner for the loss in purchasing power of corporate funds invested in the car. ibid, p. 201. In determining the extent to which such an allowance should be made, the Commission found that railroads do not finance the entire cost of purchase or construction of cars out of their own funds. It determined that the average actual cost borne by the owner approximates 20 percent, and the remaining 80 percent is obtained through various security devices, such as equipment trusts or conditional purchase agreements, wherein both the total amount to be paid and the rate of interest to be paid are fixed by agreement. Moreover, car owners pay to the underwriters of equipment obligations only the same number of dollars originally borrowed, and repayment of principal and interest is effected in dollars of current value at the time of pay-

ment. Car owners incur no increased liability to lenders due to the reduction in the purchasing power of the repayment dollars. For this reason the Commission decided that car owners should not receive from user [*sic*] a contribution measured by this inflation. The Commission found that the cost basis of cars should be constructed upon the following principles:

> "We find that the construction of fair and reasonable per diem charges under modern conditions does require an allowance to car owners for the loss in purchasing power of corporate funds invested in the car. The annual cost of owning and maintaining per diem cars should include, in addition to repair and maintenance costs and provision for property taxes, a portion of the capital expended by the owner for its purchase, together with interest on the uncovered balance, and amounts necessary to make payments of principal and interest on funds acquired through issuance of fixed liability securities to finance the purchase. Only the portion representing corporate funds invested in the car by the owner should be subject to the adjustment reflecting changes in purchasing power." *Chicago B. & Q. R. Co. v. New York, S. & Western Railroad Co.*, supra, p. 201.

In determining "the portion representing corporate funds invested in the car by the owner," the Commission took into account both the down payment and various other factors. It devised a formula which provides for applying a reproduction cost standard to 40% of the cost of the car, representing the amount actually expended by the car owner, and an original cost standard to the remaining 60%, which represents the amount financed through borrowing. The formula further allows interest at the rate of 9% on the amount actually expended by the car owner and 4% on the borrowed amount—or a composite rate of 6%. This was found by the Commission to constitute "just and rea-

sonable compensation to car owners for all costs of interest on investment and borrowed funds, including a fair return on the value of their investment and allowance for losses in purchasing power of invested funds. Ibid, at p. 214.

The plaintiff railroads contend that the debt/equity separation of 80% - 20% the Commission found as the average means of financing new railroad equipment, which is one of the components for computing the car/line [*sic*] rate, is not supported by evidence of record, and that the Commission's findings as to the cost of capital are not supported by sufficient evidence.

The Commission's finding as to the proportion of debt and equity was in part an adoption of the hearing examiner's conclusion. He stated:

> "The evidence requires the finding that few carriers finance the entire cost of purchase or construction of new cars out of retained funds. Commonly the larger part of the needed amounts is obtained through loans secured by equipment trusts or conditional purchase agreements. Not infrequently, the term for repayment of principal is 15 years, with interest on the unpaid balance varying between 2 and 6 percent.' [Footnote omitted]. While the actual portion of the cost borne by the owner in the first instance varies widely, the most common is twenty percent." Recommended report, p. 56.

There was independent and uncontested evidence of record to support the conclusion reached. The acceptance of this determination by the hearing examiner was a reasonable exercise of administrative discretion.

The Commission's decision as to a reasonable return on the invested and borrowed portion of the original cost of freight cars rested upon expert judgment as well as upon sufficient evidence. The Commission held:

"A rate of 4 percent after Federal income taxes is reasonably related to the return generally available from investments having similar risks. It compares with a return earned by railroads from freight service in 1960 of 4.5 percent after taxes and our conclusions in cases of similar reciprocal charges based upon cost, that 4 percent after taxes produced a fair return on value. *Switching at Richmond, Va.*, 245 I.C.C. 293, 298; *Switching Charges at Detroit, Mich.*, 301 I.C.C. 75, 82; *Routing Cancellation at Waterloo, Iowa*, 302 I.C.C. 477, 485. A fair return on the present value of the owner's investment requires consideration of the changes which are reflected in the Account No. 53 index of freight car costs and generally shown in tables I and II, supra. Employing this index as a guide, we conclude that interest at a rate of 9 percent before taxes on the portion of original cost herein allowed as representative of the average ownership investment, which produces approximately 5.5 percent after taxes, provides a fair return on the value of the investment, adequately compensates owners for the impact of inflation, and includes those elements of cost which should be shared by car users." *Chicago, B. & Q. R. Co.* v. *New York, S. & Western R. Co.*, supra, p. 213.

Certain railroads sought to introduce new evidence after the close of the record by including it in their exceptions to the hearing examiner's report, to support a substantially higher rate of interest measured by the average cost of equity capital of some but not all railroads. The Commission ordered the evidence stricken and denied a request for further hearing for the purpose of receiving the material presented in the exceptions and additional related data. Such a matter is within the Commission's discretion.

It is appropriate to note that in a proceeding as complex as this one the Commission's judgment and expertise are necessary commitments [*sic*] of the result. As the Commission itself observed:

> "Were the costs and apportionments involved herein susceptible of precise and indisputable calculations and application, there would be no need for recourse to this Commission. It is the existence of these numerous and extensive areas of imprecision, as well as the opposing theories as to methods of calculating and distributing the costs that make necessary the application of expertise and judgment." 332 I.C.C. 176, 205.

We find that the Commission's determination that the calculation of depreciation and return elements of car time rates should be based on original costs and not reproduction costs are supported by the record and represent a sound exercise of its administrative function. The plaintiff railroad's contention that the Commission erred in adopting a formula not specifically suggested by any party is without substance. Moreover, the formula ultimately adopted by the Commission was first prepared by the hearing examiner in his recommended report and order. All of the parties had an opportunity to debate the issue in their exceptions to the report and thus had an opportunity to be heard prior to a final determination by the Commission. As the formula prescribed by the Commission is appropriate and represents a valid exercise of judgment well within its discretion to make, it should not be disturbed.

Accordingly, an order shall be entered dismissing the complaints and dissolving the preliminary injunction.

Dated this 27th day of May, 1969.

**Appendix C**

**Civil 02981**

**Union Pacific Railroad Company, et al. v. United States of America and Interstate Commerce Commission.**

LAY, Circuit Judge, concurring:

The literal interpretation of Section 1(14)(a) of the Interstate Commerce Act (49 U.S.C. § 1(14)(a)) seems to require the Commission to consider the incentive rates along with the per diem rates and simultaneously in the same proceeding to make a deliberate choice between the two, based upon car supply factors. I have difficulty in rationalizing that the Commission has in fact made a deliberate choice as directed. I nevertheless think that the Commission has substantially complied with the mandate of the statute in temporarily applying the per diem rate and deferring "judgment" as to the quantum of incentive rates necessary. I say this for several reasons:

First, a remand would not accomplish any meaningful purpose. It would simply delay the effective date of the new per diem rates. Yet we today approve these rates and in doing so, we have deferred to the Commission's judgment that they constitute the best and wisest policy of compensation over any other method available. Further delay would only result in the continued use of the older and inferior method of per diem charges without utilization of mileage factors.

Secondly, the postponement by the Commission of the determination of incentive rates arose because there was not satisfactory evidence available on which to base incentive rates necessary to accomplish the desired end of the statute. Under Section 1(14)(a), incentive rates are subject to the Commission's *judgment*. Thus, there exists an area

of discretion as to the specific applicability of incentive rates in any given case. Certainly, if the Commission concludes that a certain incentive rate for any particular car will not "contribute to sound car service practices . . . and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and national defense," it would be arbitrary to apply the same. Cf. *Palmer* v. *United States*, 75 F.Supp. 63, 75 (D.D.C. 1947).

Thirdly, to urge a remand for the sole reason that the incentive rates hearing was not carried on in the same proceeding as the hearing for per diem rates would be to stress procedural formalism without just reason. The statute makes no such specific requirement. It only commands that car supply factors guide the Commission's determination of what rates should be applicable.

Fourth, to say the statute requires the delay of the new per diem rates until the incentive rates are to be applied is unrealistic. If so, the quick solution might be to continue the new per diem rates and then to apply the incentive factors retroactively. However, this would not be consistent with the spirit of the statute, since the primary purpose of the incentive rates is to induce future action, not merely to compensate the owners for past usage.

I conclude that the Commission must act, as soon as practicable, to set incentive rates on the basis of inadequacy of car supply. It has the affirmative duty to do so. It cannot totally refuse to do so, even if it has second thoughts and now feels the legislation is unwise or impractical. Passing upon wisdom of congressional policy is not the proper role of the Commission. However, I do not read the Commission's proceedings as announcing abdication of their responsibility. I sense only, at this time, a dedication to study in order to competently and effectively reach the desired effect Congress has set forth.

**Appendix D**

**Civil 02981**

**Union Pacific Railroad Company, et al. v. United States of America and Interstate Commerce Commission.**

VAN PELT, District Judge, dissenting:

It is with regret that I express disagreement with the holding of my colleagues affirming the Commission's action in this case.

I am in agreement that the House Bill was the one adopted and that comments as to the effect of adopting the Senate version are inappropriate. I also agree with the conclusion that the division approved by the Commission is sufficiently based upon evidence before the Commission that we should accord great weight to the division which the Commission approved.

My disagreement is in the area of congressional intent. Railroad car shortages have been an important public issue for years. For more than a decade prior to the Commission's decision now before us the Interstate Commerce Commission had before it this proceeding to increase per diem rates and thus afford some remedy for this evil. Under the guise of lack of information and that as it was investigating the situation, the proceeding remained undecided. During this delay car shortage became more acute.

The Congress thereupon properly decided to do something about it. The result was the enactment of an amendment to Section 1(14)(a) of the Interstate Commerce Act. It provided in the amendment certain language italicized in the majority opinion and which I repeat italicizing the word "shall":

> "In fixing such compensation to be paid for the use of any type of freight car, the Commission *shall* give

consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and *shall*, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive elements or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense."

In the House Report recommending this legislation, it is stated:

"If the committee amendment is enacted, the Commission in fixing compensation under existing section 1(14)(a) of the Interstate Commerce Act will be empowered, *in the same proceeding*, to go beyond the basis of elements of ownership expense in computing compensation. Where warranted consideration may be given as to whether such compensation should be increased by an incentive element or elements which will encourage acquisition and maintenance of an adequate car supply. This will be a discretionary power. . . ." See House Report No. 1183, 2 U.S. Code Congressional and Administrative News, 1966, p. 2230.

Under the Commission order now affirmed by my colleagues, a rate is promulgated which admittedly has been established without consideration of the factors which the Congress said shall be considered. Instead of considering these factors in this case, as the House of Representatives expected, as shown by the words "in the same proceeding," it has set up a separate proceeding. Whether it will pend a decade or more, as this case has, is speculation. It is not

speculation that the congressional will and intent has been disregarded by the Commission. It is not speculation that a serious car shortage exists. According to the House Report, *supra*, there is "recurring national shortages of railroad freight cars." These shortages so affect the national economy that the Congress properly gave directions to the Interstate Commerce Commission as to the elements which the Commission shall consider "in its setting of the rates of compensation to be paid for the use of any type of freight car." Congress, in view of the car shortage and the Commission's inaction, was within its rights in using the mandatory "shall" and in attempting to prevent the Commission from doing what it now proposes to do, namely, start another proceeding, with endless hearings and examinations by requiring that its action be taken in the same proceeding in which it "fixes compensation." I feel this court should insist that the mandate of the Congress be carried out now. I would set aside the Commission order and refer the case back to the Commission to make the determination in this proceeding in the manner the Congress intended.

**Appendix E**

Served January 30, 1968

30408

# INTERSTATE COMMERCE COMMISSION

No. 31358

CHICAGO, BURLINGTON & QUINCY R. CO., ET AL. v. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

No. 31358

CHICAGO, BURLINGTON & QUINCY R. CO., ET AL. v. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

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No. 31358[1]

# CHICAGO, BURLINGTON & QUINCY R. CO., ET AL. v. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

*Decided January 17, 1968*

1. In docket Nos. 31358 and 34405, per diem rates of $2.40, $2.75, $2.88 and multilevel per diem rates for the use of railroad-owned freight cars when on the lines of rail carriers other than their owners, found not shown to be just and reasonable. Just and reasonable rates, for use in the settlement of claims between the complainants and defendants determined.
2. In docket Nos. 33145 and 34405, per diem rates and conservative methods of calculation adequate to provide just and reasonable compensation to owners of freight cars and to provide for fair reasonable, and nondiscriminatory assessment of charges upon railroads using such cars, prescribed.

*Andrew C. Armstrong, John C. Ashton, Richard R. Bongartz, S. R. Brittingham, Jr., Robert J. Cooney, John A. Daily, Kemper A. Dobbins, Robert H. Duesenberg, J. H. Durkin, Donald M. Dunn, Kenneth H. Ekin, A. Paul Funkhouser, James A. Gillen, John Guandolo, Alfred W. Hesse, Jr., Howard D. Koontz, A. W. Laisy, R. D. Lalanne, Joseph L. Lenihan, Charles M. Little, David G. Macdonald, G. M. Mariner, John F. McCartney, John E. McCullough, R. K. Merrill, Martin A. Meyer, Jr., P. C. Mullen, W. H. Parsons, Charles D. Peet, Duncan B. Phillips, Ernest Porter, Leb H. Pou, Howard E. Roos, Albert B. Russ, Jr., John J. Schmidt, Andrew C. Scott, John S. Shannon, T. J. Slattery, Elmer B. Trousdale, Donal L. Turkal, Harold B. Vikoren, Robert J. Williams, Claude R. Wilson, Jr., Robert W. Yost,* and *Erle J. Zull, Jr.*, appeared for complainants in docket No. 31358 on rehearing and reconsideration.

[1] This report embraces also docket No. 33145, *National Freight Car Per Diem Charges* and docket No. 34405, *Southern Railway Company, et al. v. The Pennsylvania Railroad Company, et al.*, which proceedings were only originally in-

*Reginald Ames, Hewitt Biaett, S. R. Brittingham, Jr., Benson T. Buck, J. T. Clark, John H. Colgren, Clifford T. Coomes, Richard E. Costello, John C. Danielson, Kemper A. Dobbins, Gerald E. Dwyer, John W. Hanifin, L. W. Hobbs, Thormund A. Miller, C. Harold Peterson, Roland Posey, W. C. Purnell, Edward M. Reidy, John F. Reilly, E. L. Ryan, Jr., Jerome H. Shapiro, Matthew V. Stepsis,* and *Herbert A. Waterman* appeared for interveners in support of complainants in docket No. 31358 on rehearing and reconsideration.

*Andrew J. Azzara, Richard Swan Buell, Andrew M. Calamari, James I. Collier, Jr., William T. Griffin, Joseph P. Hawryluk, William J. Hickey, Neal Holland, J. N. Hood, Theodore S. Hope, Jr., George M. Onken, Carl E. Newton, Peter Benson Spruance, Richard H. Stokes, William Tatlock, M. Lauck Walton,* and *Granville Whittlesey, Jr.,* appeared for defendants in docket No. 31358 on rehearing and reconsideration.

*William J. Hickey* and *J. N. Hood* appeared for interveners in support of defendants in docket No. 31358 on rehearing and reconsideration.

All of the above-named counsel and, in addition, the following: *Martin J. Keating, Gordon E. Neuenschwander, Eldon S. Olson, Richard H. Strodel, Donal L. Turkal,* and *L. F. Van Kleeck* for respondents in docket No. 33145.

*John Guandolo, David G. Macdonald* and *Duncan B. Phillips* for complainants in docket No. 34405.

*Reginald Ames, Andrew J. Azzara, Richard R. Bongartz, S. R. Brittingham, Jr., Benson T. Buck, Richard Swan Buell, John H. Colgren, James I. Collier, Jr., Clifford T. Coomes, J. Crossan Cooper, Jr., James A. Gillen, William T. Griffin, John W. Hanifin, Theodore S. Hope, Jr., James W. Hoeland, Howard D. Koontz, A. W. Laisy, Richard D. Lalanne, R. K. Merrill, Thormund A. Miller, Carl E. Newton, George M. Onken, Eldon S. Olson, W. H. Parsons, C. Harold Peterson, Roland Posey, John F. Reilly, Howard E. Roos, Albert B. Russ, Jr., M. D. Sampels, John J. Schmidt, John S. Shannon, Richard H. Stokes, William Tatlock, William A. Thie, Elmer B. Trousdale, Donal L. Turkal, E. L. Van Dellen, Harold R. Vikoren, M. Lauck Walton, Edward K. Wheeler, Granville Wittlesey, Jr.,* and *Robert W. Yost* for defendants in docket No. 34405.

*Lyman C. Bybee* for Bureau of Enforcement (formerly Bureau of Inquiry and Compliance), Interstate Commerce Commission.

REPORT AND ORDER OF THE COMMISSION ON FURTHER HEARING.

BUSH, *Commissioner:*

Exceptions to the report and order recommended by the examiner were filed by several parties, each of which subsequently filed replies to the exceptions of the others.[2] Our conclusions differ in part from those recommended. Exceptions and requested findings not specifically reflected in our findings or conclusions have been considered and found not justified.

HISTORY OF THE PROCEEDINGS

The title case was commenced by a complaint filed September 21, 1953, by 19 of the larger class I railroads against several eastern railroads.[3] The complainants sought a finding and declaration by the Commission that each of the rates of $1.75, $2 and $2.40 per day charged by railroad freight car owners to other railroads for use of their cars were just, reasonable, and otherwise lawful during the periods they were effective, and that the performance of orderly transportation service by rail in the public interest required uniform observance of such rates by the defendants together with other carriers. Fifteen class I railroads intervened in behalf of complainants, and 56 railroads, principally classes II and III, intervened in behalf of the defendants. The Commission on October 17, 1955, found and declared that these rates were not in excess of reasonable compensation during the periods they were effective, that the $2.40 charge was not in excess of reasonable compensation for use at that time, and ordered the proceeding discontinued. *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I.C.C. 291 (1955).

On review by a three-judge United States District Court it was held, one judge dissenting, that the Commission had jurisdiction

[2] Bureau of Enforcement; Boston and Maine Corporation; trustees of the New York, New Haven and Hartford Railroad Company; Southern Railway System; Lehigh Valley Railroad Company; New York Central Railroad Company; Pennsylvania Railroad Company; Long Island Railroad; New Jersey and New York Railroad; Atlantic Coast Line Railroad; Baltimore & Ohio Railroad; Chesapeake & Ohio Railroad; Chicago, Burlington & Quincy Railroad; Chicago & Eastern Illinois Railroad; Chicago, Rock Island & Pacific Railroad; Denver & Rio Grande Western Railroad; Erie-Lackawanna Railroad; Great Northern Railway; Gulf, Mobile & Ohio Railroad; Illinois Central Railroad; Louisville & Nashville Railroad; Missouri Pacific Railroad; Norfolk & Western Railroad; Northern Pacific Railroad; St. Louis-San Francisco Railroad; Seaboard Air Line Railroad; Soo Line Railroad; Southern Pacific Company; Union Pacific Railroad; Western Maryland Railroad; Western Pacific Railroad; and Atchison, Topeka & Santa Fe Railroad.

[3] The original defendants included the Boston & Maine, New York, New Haven and Hartford, Long Island R. Co., New Jersey & New York, Rutland, St. Johnsbury & Lamoille County, and New York, Susquehanna & Western.

under sections 1, 13 and 16 of the Interstate Commerce Act and section 5(d) of the Administrative Procedure Act (5 U.S.C. §1004 (d)) to enter orders awarding damages and, to enter a declaratory order with respect to the reasonableness of past car-hire charges. *Boston & Maine Railroad et al.* v. *United States*, 162 F. Supp. 289 (1958). The court further held that (1) the Commission should not have rejected without a more thorough investigation and more detailed findings and analysis a recommendation that the railroad accounts pertaining to car-hire costs be broken down by the railroads to reflect more accurately the actual annual cost of maintaining a freight car; (2) where depreciation of freight cars was an important element of per diem charge for use on railroads' lines of freight cars owned by other railroads, the Commission in determining unreasonableness of such charges should not have tossed aside as irrelevant accepted accounting practices for determining depreciation based on undepreciated ledger value and should not have accepted "undepreciated [re]production (sic) value"; (3) the Commission erred insofar as it considered car age a factor in computing car utilization; and (4) where time-mileage plan for determining charges for use on railroads' lines of freight cars owned by other railroads involved a separation of national aggregate car ownership cost into two categories, such plan, under facts, deserve more than cursory consideration given to it by the Commission in determining the reasonableness of said charges, since without more detailed findings by the Commission, the court could not exercise its judicial function. The court thus set aside and annulled the order of the Commission discontinuing the proceeding and remanded the case for further proceedings not inconsistent with the court's opinion.

On appeal to the United States Supreme Court, the Commission expressed its readiness to proceed in accordance with the terms of the remand, recognizing that further investigation and more detailed findings would be required to comply with the lower court's opinion. The Supreme Court recognized, however, that:

> Should such proceedings lead the Commission to reconsider its estimate of the desirability of a *per diem* embracing a mileage factor, the result might well be not a declaration that the present *per diem* is just and reasonable but the establishment of a new rate.

*Boston & Maine Railroad* v. *United States*, 358 U.S. 68. On March 24, 1959, the proceedings were reopened for further hearing.

On July 24, 1959, by order in docket No. 33145, we initiated prescriptive action under section 20 of the act requiring detailed reports from the respondent railroads to facilitate more accurate computation of freight car per diem charges, and ordered an investigation pursuant to section 1(14)(a) with a view toward ascertaining the need for establishment of reasonable rules, regulations, and practices with respect to determining the compensation to be paid for the use of carrier-owned freight cars not owned by the using carrier. All rail carriers subject to part I of the act were made respondents. At the same time, the proceedings in docket Nos. 31358 and 33145 were assigned for hearing on a consolidated record.

Prior to June 10, 1953, most of the defendants in docket No. 31358 were parties to an agreement which provided the organization and method by which the daily rate of compensation was to be established. This agreement had been approved by the Commission pursuant to section 5a of the act, and became effective on October 7, 1950.[4] On June 10, 1953, these defendants withdrew from the agreement insofar as it concerned per diem rates and, following the increase to $2.40 on August 1, 1953, notified other lines that they would not pay the increased amount.[5] Thereafter they continued to receive and deliver cars of other lines but paid rental at a lesser rate, generally in the vicinity of $2 per day. They have continued this practice with respect to the rates as subsequently increased.

[4] *Association of American Railroads Agreement*, 277 I.C.C. 413. *Niagara C. & S. Co. v. Akron & B. B. R. Co.*, 300 I.C.C. 73, 302 I.C.C. 265. This agreement provides for use of the services of the General Committee of the Operating Transportation Division of the Association of American Railroads, and the board of directors of that organization, to make studies and recommend establishment and changes in rates, charges, rules and regulations governing per diem, mileage, demurrage and storage. Rates submitted to the members of the agreement by the AAR board of directors are effective only upon majority vote of the members but the close identity between the membership of the agreement and that of the association, together with the use of the association's facilities and committees to administer the provisions of the agreement, have resulted in the rates being generally referred to as AAR rates. For convenience, they will be so designated in this report without suggesting, however, that the legal distinction between the two organizations is not valid.

[5] The first railroad to refuse payment was the New York, Susquehanna & Western Railroad Company, which was not a party to the agreement. Its refusal took place on March 16, 1951, and is the only one which involved payments under the $1.75 and $2 rates. Subsequent to the institution of proceedings in docket No. 31358 this defendant changed management, paid arrears at the rates assessed and has since paid the assessed rates. No issue thus remains with respect to the rates preceding the $2.40 rate.

Following the institution of proceedings in docket No. 31358 there were filed in the United States District Court, Southern District of New York, 109 complaints, consolidated by the court for all purposes, wherein numerous railroad plaintiffs seek to recover from the New York, New Haven and Hartford, and the Boston & Maine, for the use by the defendants of plaintiffs' cars at a rate of $2.40 per day from August 1, 1953, through December 31, 1956, of $2.75 from the latter date to December 1, 1959, and since then of $2.88,[6] less interim payments of about $2 per day made under temporary settlements. The defendants answered contending, among other things, that the claimed rates were unreasonably high and counterclaimed for the difference between the amounts actually paid and any lesser amounts which might be found reasonable. *Baltimore & O. R. Co.* v. *New York, N. H. & H. R. Co.*, 196 F. Supp. 724, 726-727 (1961). On June 15, 1962, the court disposed of several motions and directed entry of partial interlocutory summary judgment in favor of 21 of the plaintiffs extending only to a declaration and adjudication that they are entitled to recover per diem in such amounts as are ultimately found by the court to be due them:

> • • • based upon a rate to be found just, fair, reasonable, and nondiscriminatory by the Interstate Commerce Commission, of which said Commission shall advise this court and thereafter to be ultimately determined and fixed by this court for each month beginning with August 1953 to date to be computed with interest.

The order provided for grant of partial judgment for the remaining plaintiffs. Entry of final money judgment was stayed pending our determination of the controversy in docket No. 31358 or until further order of the court. By order entered on December 19, 1962, leave was granted to amend the complaint in this proceeding so as to request the Commission to furnish the desired findings.

The Illinois Central Railroad Company, one of the complainants in docket No. 31358, is a defendant in two suits pending before the Supreme Court of the State of New York, county of New York, captioned, in part, in one case, *Boston and Maine Railroad* v. *Illinois Central Railroad*, index No. 115/59, and, in the other, *New York, New Haven, and Hartford Railroad Company* v. *Illinois Central Railroad*, index No. 70/63. In each case, the plaintiff sued

[6] Whether these proceedings include charges accruing thereafter, or include charges based upon the multilevel rates, effective January 1, 1964, are not of record. A few of the suits have been settled by agreement of the parties.

the Illinois Central for interline freight balances and it counterclaimed for per diem balances. In dismissing the Boston and Maine's motion to dismiss the counterclaim against it and for summary judgment, the court deferred ruling on the counterclaim to await advice from this Commission as to what per diem rates it would find lawful. Accordingly, the complainants in docket No. 31358 filed an amendment of the complaint praying that the Commission, without regard to the proceeding in docket No. 33145, advise not only the United States District Court for the Southern District of New York, but also the aforementioned Supreme Court of the State of New York in the cases there pending, what per diem rate was just, fair, reasonable, and nondiscriminatory for each month beginning with August 1953, to date, and in so advising the court, find and declare that a rate no less than each of the rates in issue in docket No. 31358 was, during the period each was in force, just, fair, reasonable, and nondiscriminatory.

On March 2, 1964, Southern Railway Company and its affiliates filed a complaint with this Commission (docket No. 34405), pursuant to section 1(14)(a) of the act, against the Pennsylvania Railroad and numerous other railroads, as defendants, challenging the validity of the multilevel per diem rates which had replaced the $2.88 rate, effective January 1, 1964, and praying the Commission to fix for the future, reasonable rules, regulations, and practices respecting freight car per diem service including the compensation to be paid and the basis therefor. Consolidation of the proceeding for hearing with those in docket Nos. 31358 and 33145 was requested and granted.

On March 6, 1964, the Commission granted complainants in docket No. 31358 leave to further amend their complaint so as to bring in issue the multilevel rates which had become effective on January 1, 1964.

We have heretofore observed that the performance of orderly and efficient transportation service by rail will be improved by uniform observance of per diem charges by all carriers. *Association of American Railroads—Agreement, supra.* That conclusion is unmistakably confirmed by the record in these proceedings. The examiner recommended that the railroads continue to administer per diem through the facilities of the per diem agreement, and that the Commission not enter an order at this time which would supersede the procedures and the rights of the parties to that agreement. Upon consideration of the entire record, and the pleadings subsequent to the examiner's report, we find the necessary accord among all participating railroads to be lacking. Our

order herein will, therefore, provide for specific per diem rates and procedures applicable to all railroads and will supersede any existing procedures which are inconsistent herewith.

## ISSUES

The issues presented by the above-described proceedings are whether the rates charged at various times over the past decade and a half by car-owning railroads for the use of their cars by other railroads were just, reasonable, and compensatory as provided in sections 1(10), 1(11), and 1(14)(a) of the act; and if not, what rates would meet the standard for that period; and, what rate, rates, or method of establishing rates, will insure the satisfaction of that standard in the future. However, our findings in docket No. 31358 as to the reasonableness of the rates charged in the past are of significance only as an aid to the courts in settling the amount of damages in the pending lawsuits. For convenience, the parties to these proceedings are referred to herein as respondents, except where the context requires more specific identification.

## BACKGROUND

During the early development of the railway networks which now cover the United States, it was customary for the individual lines to acquire freight cars necessary for their own operations, and to retain them in their own service. Where freight originating on one line moved to a destination on another, the lading was physically transferred from the car of the originating line to the car of the connecting line. As the railroads grew, this method of handling traffic proved uneconomical and it eventually became the general practice for the originating carrier to deliver its car to the connecting line for movement beyond without disturbing the lading. Cars involved in this interchange service with which the charges here in issue are concerned, are customarily referred to as "per diem" cars. Certain cars, such as refrigerator and tank cars handled under special arrangements, are not involved.

With the enactment of the Interstate Commerce Act, the then established custom of interchanging cars became obligatory on carriers where through routes were established. See *Missouri & Illinois Coal Co.* v. *I. C. R. R. Co.*, 22 I.C.C. 39, 44-45; *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U.S. 80, 91, 101-102; and *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 615. While

contributing to transportation efficiency, this method of operation created certain problems with which the industry has wrestled ever since.

The right of the car owner to compensation when its car is used by another line has frequently been recognized. See *Virginia Blue Ridge Ry.* v. *Southern Ry. Co.*, 96 I.C.C. 591, 593-594; *Morehead & North Fork R. R. Co.* v. *C. & O. Ry. Co.*, 100 I.C.C. 45, 48; *Jefferson & Northwestern Ry. Co.* v. *M., K. & T. Ry. Co.*, 102 I.C.C. 72, 75. Ascertainment of the amount of compensation and the manner in which it is to be assessed, however, has been subject to considerable experimentation and difference of opinion. In the late 1860's the rates were generally 1 cent per mile on cars of special construction, and 3/4 cent per mile on ordinary cars. They were established by various agreements between railroads, as no national association then existed. In the early 1870's a railroad in New England experimented with a combination mileage and time plan, and two central western carriers employed a rate of 50 cents per day between themselves. In 1888 a combination of mileage and per diem payment was attempted but abandoned after a few months due, among other factors, to the increased accounting costs. The straight mileage system was finally abandoned in 1902 and on July 1 of that year the flat daily rate system of charging became effective. See *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 374-375; *Chicago, R. I. & P. Ry. Co.* v. *United States*, *supra*. This method prevailed until January 1, 1964, when it was modified by providing a scale of daily rates varying with the value of the car. By 1920 the daily rate had risen to $1 per day, and by September 1, 1947, to $1.50 per day.

Subsequent increases were as follows:

| | |
|---|---|
| Effective November 1, 1949 | $1.75 |
| May 1, 1952 | 2.00 |
| August 1, 1953 | 2.40 |
| January 1, 1957 | 2.75 |
| December 1, 1959 | 2.88 |
| January 1, 1964 | multilevel rates |

The multilevel rates which became effective on January 1, 1964, were as follows:

| *Value bracket* | *Per diem rate* |
|---|---|
| (1) $1,000 and less | $2.16 |
| (2) 1,001 to 5,000 | 2.79 |
| (3) 5,001 to 10,000 | 3.58 |
| (4) 10,001 to 15,000 | 4.50 |
| (5) 15,001 to 20,000 | 6.15 |
| (6) Over $20,000 | 7.74 |

On April 1, 1965, following the close of the hearings in these proceedings, a further revision was made in the scale of multi-level rates, of which official notice is hereby taken. This revision substituted four new brackets for cars formerly covered by bracket No. 6, as follows:

| | |
|---|---|
| (6) $20,000.01 to $25,000 | $7.11 |
| (7) 25,000.01 to 30,000 | 9.00 |
| (8) 30,000.01 to 35,000 | 10.18 |
| (9) 35.00.01 and over | 12.18 |

If there were but two railroads, and each used the other's cars to the same degree, the payments would balance and it would matter little whether they were established at $1 or $100 per day. For those railroads today whose payments balance receipts within reasonable limits, the problem is quite similar. The actual situation however is far more complex for many carriers. Nearly all railroads are car owners, and all railroads are users of cars owned by the others. In 1960 there were over 100 class I line-haul railroads, over 300 class II line-haul railroads, and about 200 classes I and II switching and terminal companies and electric railways involved in these payments. The significant figures are the net payable balances and at any given time a carrier may be a net creditor as to one line, and a net debtor as to others. A line which is, in total amount, a net creditor line on an annual basis, may be in a net debtor position with respect to particular lines, and all these relationships can vary from month to month throughout the year. Railroads having a high ratio of originations of shipments to terminations generally occupy a net per diem creditor status. Those having a high ratio of terminations to originations are generally net per diem debtors.

### The Statute and Nature of Per Diem

Section 1(10) of the act defines "car service" as including the use, control, supply, movement, distribution, exchange, interchange, and return of cars by any carrier by railroad subject to

part I. Section 1(11) makes it the duty of every such carrier by railroad to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service. Unjust and unreasonable rules, regulations, and practices with respect to car service are prohibited and declared unlawful. Section 1(14)(a) authorizes the Commission, after hearing, to establish reasonable rules, regulations, and practices with respect to car service, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any car not owned by the carrier using it.

In prescribing the compensation for the use of foreign cars[1] pursuant to section 1(14)(a) of the act, the Commission is exercising its statutory authority to establish basic per diem predicated upon costs. The owner of a car, required to release possession thereof to another carrier for the further transportation of the freight it contains, may not be deprived of its use without compensation. On the other hand, the carrier obtaining the use of the car is required to accept possession for the purpose of continuing the transportation, and may not be required to pay therefor more than the average cost it would have incurred as owner of the car or by use of its own car. The two requirements cannot be met except by calculation of the average ownership burden based upon costs, measured with such accuracy as is reasonably possible and distributed among the car users and owners in a manner which can be found most equitable to all. We agree with the conclusion of the examiner that the "compensation" mentioned in section 1(14)(a) of the act relating to "basic" per diem does not include any element of profit to the owner of the car and may not be measured by the benefit which the user derives from use of the car. Per diem charges are in the nature of a reciprocal charge and are designed to represent the average cost of car ownership. The charge should be equivalent to the average car ownership costs which the users would have to bear if they owned the car. See *Virginia Blue Ridge Ry. v. Southern Ry. Co.*, *supra*; *Jefferson & Northwestern Ry. Co. v. K., A. & T., Ry. Co.*, *supra*; *Marcellus & Otisco Co. v. N. Y. C. & H. R. R. Co.*, 104 I.C.C. 389, 392, *Rules for Car-Hire Settlement*, *supra*; *Scott Ry. Equipment Co. v. Assn. of American Railroads*, 274 I.C.C. 469, 482; *Palmer v. United States*, 75 F. Supp. 63. "It has long been generally recognized that car hire, however established, should be

[1] Customarily referred to as a "foreign car."

enough reasonably to compensate the car owner for its costs of ownership and no more * * *." *Boston & Maine Railroad* v. *United States*, *supra*.

This conclusion is confirmed by the 1966 amendment to section 1(14)(a) and the statutory history relating thereto. The basic per diem charge may not be used, or include sums as elements of compensation, to enforce car service rules, encourage car acquisition, et cetera; these functions being reserved for the added incentive element when found justified. As amended by Public Law 89-430, section 1(14)(a) now provides, in part:

> In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

In its prior form, this statute also required the compensation to be reasonable and we do not view the added language as making any change in this respect.[8] As a result of this amendment, however, the function and composition of basic per diem rates have been clarified. They are applicable to per diem cars generally, and are to be computed solely on the basis of elements of ownership expense involved in owning and maintaining the cars, including a fair return on value. Per diem charges may not include any amount for the value of the use of a car. See Cong. Rec.—House—May 12, 1966, page 9946.

There is sound reason why these per diem charges should constitute no more than a sharing of cost. We are not concerned with the problem of calculating proper charges to customers of the respondents, but with the assignment among a group of carriers engaged in multitudinous joint ventures, of the burden of acquiring and maintaining the vehicles used by all. Not only is their use compulsory,

[8] See 112 Cong. Rec. (House), May 12, 1966, page 9946. The amendment was worded in that language after the courts had given to the designation of the fair return on value.

on the paying line but a great deal of the use which is made and for which charges are paid is not productive of revenue to the user. This occurs on empty return of cars to owners which, in many instances, is accomplished by carriers who did not participate in the loaded revenue movement which took the car off line. The relationship of the parties is not that of a lessor and lessee, and the term "rent" frequently employed to describe the per diem charge does not connote such a relationship.[9]

Costs

Upon reopening of docket No. 31358, we instituted the investigation proceeding, docket No. 33145 and incorporated therein an order under section 20 of the act, requiring the filing of special reports by all railroads. These reports were analyzed by staff personnel of our Bureau of Accounts and a series of cost computations were made which were thereafter served upon all parties and submitted in evidence. We adopt as a correct statement of the facts, the description by the hearing examiner of these reports and computations, and of those employed by the AAR staff in developing the per diem rates adopted by the members of the per diem agreement. The pertinent portions of the examiner's report are set forth in the appendix to this report.

Generally recognized as the largest single item is the group of costs properly attributable to the repair and maintenance of cars in interchange service. After consideration of the various criticisms directed to the cost calculations prepared by the section of Cost Finding, Bureau of Accounts, the examiner concluded that the ownership costs developed by the studies, apportionments, and analysis, for maintenance and repair of freight cars and associated facilities, for 1960, were as accurate as could reasonably be obtained and fairly represented the total ownership costs for the year.

Car repair costs and associated maintenance expenses, as developed by the Cost section of Cost Finding studies and analysis are as follows:

| | |
|---|---|
| 1. Freight-train car repairs including allocation of inspection costs, nonrevenue freight, overheads, maintenance of shops, power plants, work equipment, miscellaneous equipment, and switching bad order cars | $583,715,147 |
| 2. Depreciation on freight-train car repair facilities computed on undepreciated original cost | $8,023,021 |
| 3. Property taxes on car repair facilities | $3,824,341 |
| 4. Payroll taxes | $28,140,156 |
| 5. Return on investment in freight-train car repair facilities computed at 4 percent (after income taxes) on depreciation original cost | $11,489,897 |
| 6. Return on working capital | $2,896,316 |
| Total | $638,098,858 |

This total cost, divided by the 1,641,200 average number of per diem freight train cars in service in 1960 produces an average repair and maintenance cost per car of $388.80. Exceptions to the examiner's report do not challenge the method or accuracy of this computation insofar as it calculates the total ownership cost of repair and maintenance, but are directed to the apportionment of those costs between home and foreign cars and the development of an amount referred to as the "repair deficiency."

A great deal of repair work is accomplished on foreign cars by using railroads. Repairs made necessary by improper use and handling of the car are not considered ownership responsibility items; and the costs are customarily borne by the responsible railroad. For the purpose of computing per diem rates, ownership repair costs are those made necessary by ordinary usage, and the maintenance normally required to keep the car in good operating condition. Interchange Rules of the Association of American Railroads provide specifically for the calculation of the amounts which owners are to pay users for repairs made by the latter. The figures used by the Section of Cost Finding in developing the total repair cost include all costs which were assigned as the responsibility of the owners, whether they were accomplished by the owners or by users. Initially the calculation of ownership cost was accomplished upon the assumption that owners had fully paid users, and had thus borne themselves all the costs of ownership responsibility repairs. Certain respondents contend that the amounts which owners pay to users for such repairs, pursuant to the AAR rules, are inadequate, and that the deficiency should be taken into account in calculating the ownership cost and resulting per diem rates. Of the $583,715,147 of total ownership responsibility repairs for the year 1960, as computed by the Section of Cost Finding, the distribution produced by the sample studies indicates that $186,482,539

was accomplished by user railroads and that $98,534,020 of this amount was not reimbursed to them by the owners. Distributed over the per diem days paid for by all U. S. railroads in 1960, the latter amounts to 41.417 cents per day.

Certain of the respondents challenge the accuracy of apportionments used in developing this "repair deficiency," and renew their objections to the refusal of the hearing examiner to receive certain exhibits related thereto. Also excepted to by other respondents is the refusal of the examiner to deduct the deficiency from total ownership costs before calculating the per diem rate.

The exhibits in issue were not submitted in compliance with the special rules of procedure established for the conduct of these proceedings and were properly excluded. In view of our conclusions with respect to the "repair deficiency" it is unnecessary to give further consideration either to these exhibits or to the challenged Section of Cost Finding calculations and apportionments. The determination of reasonable compensation to the owner of a freight car for the costs of purchase and maintenance of a car which it puts into per diem service is a problem distinct from the adequacy of payments it makes to other parties for performance of some of its responsibilities. The issue of setoff payments should not be allowed to becloud the solution sought in this proceeding. Introduction of contentions regarding the adequacy of reimbursements by owners would import into this case a secondary dispute, and put on trial the AAR method of establishing the standard charges between railroads for repair of each others cars.

In computing the ownership costs it is proper to take into account all expenses incurred in maintaining interchange cars in operable condition, other than user responsibility items. Whether the costs incurred by users in effecting ownership responsibility repairs are fully reimbursed to them under another set of rates and regulations made by the carriers' own organization is irrelevant. The methods used to compute those rates are subject to review and revision by the AAR, as found necessary. To compute and apply a fixed amount as a deduction from total ownership costs before calculation of the per diem rates would tend to freeze into its present mold the method used by the AAR in an entirely separate area.

Such a deduction requires the assumption that, in all cases, with respect to each owner, the total cost of repairs made by each user to cars of that owner exceeds by precisely the same amount the sum paid by the particular owner to the user as reimbursement under the AAR rules. No logical relationship was shown to exist

between the number of foreign car days on line on which per diem would be computed, the amount of repairs made, and the fixed amount of the deficiency allowance. The evidence with respect to car days and reimbursements is persuasive that application of the car-repair deficiency as a flat reduction in the per diem rate would produce an inequitable distribution among the carriers. Users who accomplish few repairs but have a relatively high proportion of foreign car days on line would receive excessive reimbursement, and *vice versa*. The impact upon owners would also be inequitable. Each owning line would suffer the same reduction in its per diem receipts, regardless of the line using its car. The effect would be to require owners to overcompensate users in some instances, while undercompensating other users.

Certain respondents contend that reduction of the per diem rate by application of the average amount of repair deficiency is no more than another application of average costing to a problem which admittedly must rely upon averages with respect to many items. The distinction, however, is that reliance upon an average in this instance is not required. Settlements of repair reimbursements are made regularly by and between individual carriers by billings for specific repairs. It is clearly possible, by making these billings properly renumerative in each instance, to effect reimbursement according to actual costs and avoid the inequities inherent in averaging.

The argument is made that allowance of the repair deficiency is essential if equitable treatment is to be given user lines, and that to fail to make such allowance would constitute a taking of their property without due process. It is asserted that, since the total amount for which they were liable in 1960 was $594,541,744, and, since allegedly, they were not reimbursed for $98,534,020 of ownership repairs made by them, users have, in effect, already paid that much. The failure to deduct it before calculating the per diem rate allegedly requires them to pay it twice. The appeal to justice in this contention loses force, however, upon close scrutiny.

All of the several hundred carriers affected by these rates are users of cars of each other, make repairs on cars of others, and, to the extent that there is a deficiency in the reimbursement for the cost of such repairs, suffer therefrom. The record warrants the conclusion that the impact of the deficiency varies widely from carrier to carrier. Of all these carriers, only four contend that the deficiency should be calculated and subtracted from the

total ownership costs in determining the per diem rate.[10] None including these four, have attempted to have the AAR rates for reimbursement revised to eliminate the deficiency. Of the four which support the contention, only two, the New Jersey and New York and the Long Island Railroad, appear on this record to suffer from the deficiency. Both the Boston & Maine and the New York, New Haven and Hartford derive substantial benefits from the failure of the AAR rates to include all repair costs. A study of payments and receipts of 18 major railroads in connection with the B&M and the NY, NH&H, indicates that, in 1960, the B&M received a total of $57,848.75 for repairs it made to their cars and paid the same lines $162,117.08 for repairs they made to B&M cars. It is apparent that the B&M received the benefit of nearly three times its unreimbursed costs in repair costs on its cars which it did not reimburse.[11] The New Haven, in 1960, received $92,316.30 for repairs which it made and paid the same lines $309,913.27. It enjoyed the benefit of repairs to its cars at unreimbursed costs over three times those which it failed to recover under the AAR rates.[12]

Losses due to the repair deficiency are incurred only to the extent that a line makes more repairs to the cars of another than that other makes on its cars. Both the B&M and the New Haven are predominantly terminating lines, having available many more foreign cars than needed for their originations, and can employ some selectivity in their choice of cars to supply to shippers. Both exercise careful control over the amount of foreign car repair work undertaken. The B&M has a policy of making repairs to foreign cars primarily to put them in condition to pass safety tests of the AAR interchange rules. While there is some evidence that certain of the repairs made by other lines to the B&M cars might not have been considered necessary by that

railroad, the record does not warrant a finding that unnecessary repairs are made to any measurable extent. The major originating lines have shipper demands for cars requiring the use of foreign cars which need repairs, not only for safety purposes but also to make them fit to handle the freight. These lines have not the extent of choice in cars to be supplied, and are obliged to make more light repairs than predominately terminating lines.

The Long Island Railroad, having no cars in per diem service, does not enjoy the benefit of the allegedly underpriced repairs. It and the New Jersey and New York Railroad are the only lines suffering a loss from this situation which seek to have it remedied by a reduction in the per diem charges. As computed for 1960, the reduction amounts to 45 cents per day spread over the per diem days paid for by class I line-haul roads, and about 41 cents per day if spread over the per diem days paid for by all U. S. roads. Figures assembled by 20 railroads for the year 1960 indicate that total payments by them to the Long Island for repairs to their cars were $33,321.19. Assuming the accuracy of the deficiency as calculated by the Section of Cost Finding this would indicate a possible unreimbursed amount, using the average figure, of $37,575. These railroads had over 400,000 per diem days of their cars on the Long Island. At the average deduction of 41 cents per day this line would receive an offsetting reduction in per diem costs of over $160,000, over four times the indicated loss. The record also shows that the Long Island, like all other railroads, incurs liability for repair of foreign cars which falls into the user class, and which it satisfies by returning the cars to the owners, paying the owners at AAR rates for effecting the repairs. It thus obtains certain benefits from the ability to pay for the repairs at the AAR rates instead of making the repair itself at higher cost. While this class of repair work is not part of ownership costs included in the car rental charges, its existence cannot be ignored in considering the extent to which carriers suffer from the limitations on reimbursement in the AAR rates.[13] The record does not disclose the extent to which benefits were obtained in this manner but it is apparent that even this railroad did not suffer unmitigated inequity from the lack of complete reimbursement for its expenses in repairing foreign cars. The

[13] For 1960, the Long Island received $7,185.42 from the New York Central for repairs to the latter's car, but paid that line $13,542.48 for joint repairs on NYC cars for which the Long Island was responsible. It thus received the benefit of nearly twice the amount of deficiency that it suffered on the repairs it made.

experience of the New Jersey and New York Railroad in this respect is not shown.

All other respondents oppose use of the deficiency as a deduction from the per diem rate. The B&M and New Haven, which contend that use of the deficiency in this manner, appear to have benefited from the existence of the deficiency, and it is clear that they would experience less favorable repair balances if the AAR rates were increased to the extent necessary to eliminate the apparent deficiency. If, however, the deficiency is deducted from the per diem charge, these lines will obtain a further benefit. Since they are per diem debtors, such a reduction, like any other action having the effect of reducing the rate, would lower the net balance payable by lines in this position. The consequence would be that these lines, which have already enjoyed the benefit of having their cars repaired at savings in cost exceeding the losses they sustained in making undercost repairs to other cars, would receive a second benefit from deducting the deficiency from their per diem bills. The other lines, on the other hand, would suffer a double loss. It cannot be found that failure to deduct the deficiency from the per diem rate would result in a taking of property without due process from the parties seeking this relief.

Upon all the evidence, it is found that the car repair deficiency, to the extent that it actually exists, should be corrected by adjustment in the AAR billing rates, and that any attempt to compensate for the deficiency by a deduction from the car rental charge would be unreasonable.

The analysis employed in developing the repair and maintenance costs of per diem cars by the Section of Cost Finding is based upon more recent data than that employed in the analysis used by the AAR. (See appendix.) As hereinafter discussed, the various ratios and apportionments developed by the 1960 studies are, in large part, useable in the calculation of costs for other years under this method. Insofar as the development of total ownership cost of repair and maintenance of per diem cars is concerned, no persuasive objections to its adoption have been shown. Upon the record, we find that, subject to adjustments hereinafter mentioned, the total per diem ownership repair and maintenance costs developed by use of the method appearing as schedule I of the Section of Cost Finding analysis fairly and reasonably measures the amount for which owners should be reimbursed. We shall require that this method be employed in the

calculation of per diem ownership repair and maintenance costs for the purpose of setting per diem rates in the future.

Property taxes on freight cars are so varied from State to State and for various periods as to make precise measurement impracticable. The amount is estimated by both the AAR and the Section of Cost Finding by use of a factor developed by taking a ratio of all property taxes to total investment and applying this ratio to the investment in freight cars. In recent years the ratios have varied from slightly under to slightly over 1 percent. We find that this procedure results in a just and reasonable allowance for this expense.

Compensation to the owner for the burden which is assumed in purchasing or building the car has customarily been calculated, on an annual basis, by including an amount representing the depreciation charges for 1 year and an amount representing an interest return on the undepreciated balance of the cost. In the calculations underlying the AAR rates prior to 1953 the average original cost of all cars as the base for depreciation was used. In subsequent years the base employed was the average original cost adjusted by an index designed to produce what has been called reproduction cost. Straight-line method of depreciation has been used, at the average rates used by carriers and authorized by the Commission, approximating 3.0 percent. In effect, this has amounted to an allowance of 10 percent of car cost as salvage value and a spreading of recovery of the remaining 90 percent over an assumed life of about 30 years. Beginning with the studies underlying the $1.50 rate in 1947, the base used to compute interest was the average of depreciated original cost and depreciated reproduction cost of the average car in the fleet. In studies underlying the $2.75 and later rates, depreciated reproduction cost was used as the base. In all instances, interest was computed at 6 percent before taxes.

The present multilevel system of per diem rates also provides for investment costs by including amounts for annual depreciation and interest on the undepreciated balance of the cost. Under this system, the cars are grouped in nine brackets, six of which cover spans of $5,000, one a span of $4,000, one a span of $1,000, and the last, all cars costing over $35,000.01. Cars are placed in a bracket according to their original cost plus additions and betterments, depreciated. The rate applicable to all cars in each bracket, however, is based upon allowances for depreciation and

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interest using the weighted average of the reproduction costs of the cars.

The analysis prepared by the Section of Cost Finding in these proceedings used original cost as the base for depreciation and depreciated original cost as the base for interest charges. Straight-line depreciation was used at a rate of approximately 3 percent. Interest at a rate of 6.62 percent before taxes, equivalent to 4 percent after taxes, was allowed on the depreciated original cost. Southern Railway seeks the use of a shortened depreciation period of 14 years while, on brief, certain other respondents contend that the 30-year period should be retained for cars in the 3 lower AAR value groups, but that a shortened period of 20 years be employed for cars in the higher groups. No evidence was offered in support of the latter suggestion and we find that neither of the shorter periods are practicable at this time.

Attention is called to the fact that recent revisions of regulations of the Department of the Treasury may permit railroads to employ a 14-year period for calculation of charges to depreciation. Although it is argued that this represents a considered assessment by the Department of the realistic economic life of freight cars, the record does not support such a conclusion. Neither the revised regulations nor the factors which underlay the change in depreciation period allowances were shown. So far as appears on this record the change stems from a policy decision to encourage investment, and is applicable to a carrier only if it satisfies the Department that particular proportions of its capital are being renewed according to a prescribed schedule. Freight car value comprises only a portion of the total involved. The test is based upon dollar totals rather than with reference to the lives of specific equipment.

The record demonstrates that railroad freight cars are used for periods which greatly exceed the suggested periods of 14 and 20 years. There is no convincing evidence that railroad management generally considers cars to be no longer economically useful after these periods have expired. As of January 1, 1962, nearly 38 percent of the cars in service were over 20 years old, and over 49 percent were over 15 years old. Of 1,606,475 freight cars in interchange service, on January 1, 1962, 324,729, or 20.2 percent, were over 30 years of age. Over 13,000 of these cars had been in operation for more than 50 years. Ten years earlier, in 1952, the number of cars over 30 years was 315,935, or 17.92

percent of the total. No tendency to a reduction in the useable life of cars is indicated. While managerial views might differ as to the advisability of retaining some of the older cars, it is evident that car owners do not consider them unserviceable after 15 or 20 years of use. Nor can it be found that cars now being constructed will be subjected to any different treatment in this respect.

A further consideration which may not be ignored is the fact that the freight rates charged shippers, which are the source of income from which each user must pay its proportion of the costs of the service, generally are constructed with reference to costs of operation based upon a spreading of capital costs of revenue earning equipment over periods substantially longer than 15 years. While the amounts included as charges to depreciation and interest represent only a portion of the total considered in assessing the compensative qualities of freight rates, they are not insignificant.

The expected useful life of the car is a measure of the appropriate annual depreciation charge only when considered in connection with the portion of the cost to be depreciated. Deduction of 10 percent of the cost as the anticipated salvage value is a customary and convenient method of fixing the portion but it is not necessarily more reliable than other possible choices. The Section of Valuation and Depreciation of the Bureau of Accounts employs an estimated 17-percent salvage value and a 25-year life, which indicates an annual rate of depreciation of 3.32 percent. The total depreciation reported in railroad annual reports to the Commission in 1960 for freight cars was $205,740,270, of which $197,060,088 was assigned to per diem cars by the Section of Cost Finding analysis of the distribution of per diem and non-per diem cars. In addition, this analysis allowed $17,594,870 taken from Rail Form A calculation of normal depreciation applicable to per diem cars already amortized. The total of $214,654,958 amounts to 3 percent of the Rail Form A total original cost of these cars as of December 31, 1960, of $7,063,892,859. The record shows depreciation rates of freight cars currently in use by a number of railroads which range from 2.55 percent to 3.60 percent. We find that an annual allowance of 3 percent of the cost of freight cars as a portion of the costs employed in calculating per diem charges provides just and reasonable contribution by car users and adequately provides for reimbursement of car owners for the loss in value of the car.

Railroads which buy or build cars today face a problem caused, in large part, by the radical change in the character and cost of

railroad freight cars which has occurred in the past 20 years. A gradual increase in the cost of producing standard cars would not by itself have produced so pressing a problem, so long as freight cars, on the average, were of a few general types and cost about the same to build and maintain. Such had been the situation for many years prior to World War II and, while increasing costs resulted in increasing the car rental rate up to the $1 per day which it reached in 1920, and at which it remained until 1945, there had appeared no radical variations in the average costs of cars in the fleet. This condition underwent a substantial change after 1945.[14] The problem of rapidly increasing costs has been augmented by the development of special types of cars, and special features for the protection of freight which, together with the trend to larger cars, has produced appreciable disparities in the costs of the various cars now in use. The differences in the original costs of modern cars have made unrealistic the application of a single, uniform per diem charge. In order to provide reasonable compensation to car owners, charges must be assessed which reflect, as accurately as possible, the particular acquisition cost of the car in use. At the same time, there also arises a need to exercise care in determining the amount necessary to reimburse owners for that cost.

Certain respondents contend that rates carrying with car cost cannot be approved or prescribed due to the lack of reliable information as to the extent such cars vary in their repair cost experience and annual utilization. It is argued that the new, high-cost cars receive much greater use than the older cars, and should have their higher costs spread over a greater number of active days than the average of all cars. The increasingly higher investments required to acquire new freight cars in recent years, however, make it necessary to apply varying rates in order to compensate for the burden undertaken by owners of such cars. While some evidence indicates that the newer cars spend more time off line than old cars, and perhaps incur a greater number of per diem payable days by foreign lines, it does not support any finding that their overall utilization, both on and off line, is measurably different. It was not shown that any workable separation can be made between cars on the basis of value, which relates to utilization. No studies were made with respect to this alleged distinction in the car-day divisor and no basis exists for finding the average divisor inapplicable to cars in all value brackets.

[14] Between 1939 and 1945 the Bureau of Statistics used index for Account No. 53, Freight Train Cars, base 100 points, an average of about five points per year. Between 1945 and 1950 the increase was 341 points, or nearly 25 points per year.

A similar conclusion is apparent with respect to costs of repair and maintenance. If a significant difference exists, the age of the car appears to provide a more certain measure than the depreciated value currently assigned to the car. It cannot be found on this record, however, that any measurable progression in repair costs exists in relation to either the age or depreciated value of the car. Nor can it be found that the difference, if any, between the average repair cost and the actual repair cost of new or old cars, is so great as to make unreasonable the results reached by use of the average. We would not be warranted in stepping up rates varying with car cost merely because of the uncertain possible differences in utilization and repair costs. If future studies demonstrate that measurable and significant differences exist, they should be brought to the attention of the Commission.

We consider it unsound the contention that nationwide average costs should not be used in the calculation of per diem charges. This has been the industry practice for many decades, and to our knowledge no uniform charges be reasonably computed. That the costs experienced by different car owners vary, and as a result the extent of their reimbursement through the per diem payment will vary, is a consequence which must be accepted if the uniformity in charges which we have found essential to orderly and efficient transportation by rail is to be achieved.

One of the many issues in these proceedings is the extent to which depreciation cost should be employed as the base for calculation of depreciation allowances. We have observed that equitable treatment of both car owners and users requires that the actual costs be considered with such accuracy as is reasonably possible. If car owners are to be compensated for some additional amount, it is incumbent upon them to establish the propriety of the payment.

It is common knowledge that the purchasing power of the dollar has been steadily reduced over the past 30 years. Many more dollars would be required to purchase today a car identical with one built 30 years ago, and a car owner receiving payments from car users in dollars of current purchasing power does not receive the same relative contribution to the cost of the car as it made at the time of purchase. Had each user of the car been the original purchaser, it would be subject to the same erosion of the dollar

chasing power of the dollars used, and would reasonably be expected to bear a share of that erosion. The use of reproduction cost as a basis attempts to translate into dollars of today's value the number of higher value dollars invested in the car, and to spread the impact of inflation over all users, including the owner. In principle, equating the per diem dollars contributed by users to dollars actually invested by the owner appears essential to fair compensation. Thus, to the extent that the per diem charge is comprised of reimbursement of such funds, the contribution with respect to the cost should be measured in dollars of purchasing power equivalent to those invested.

Proponents of the unrestricted application of reproduction cost to the full cost of the freight cars have failed to show that this method of calculation provides a reasonable measure of the actual costs incurred. In periods of rising prices, borrowing shields an investor from decline in purchasing power. The risk of decline in terms to the lender and clearly no need exists to compensate the investor therefor. The evidence in this record requires the finding that carriers do not finance the entire cost of purchase or construction of cars out of railroad funds. Commonly the larger part of the needed amounts is obtained through private security devices, such as equipment trusts or conditional purchase agreements, wherein both the total amount to be paid and the rate of interest to be paid is fixed by agreement. Generally, the term for repayment of principal of such loans is about 15 years, with interest on the unpaid balance ranging between 3 and 6 percent. The section of Cost Finding studies in 1961 indicated an average interest rate on outstanding obligations of 4 percent. While the actual portion of the cost borne by owners in the form of interest varies, the average approximates 20 percent.

Car owners are required to repay to the underwriters of equipment obligations only the same number of dollars originally provided. Repayment of principal and interest charges on these sums is effected in dollars of current value at the time of payment. The freight car owner incurs no increased liability to lenders due to the reduction in the purchasing power of the repayment dollars, and should not receive from users a compensation unwarranted by the inflation. We find no justification for basing these costs on cost of a reproduction cost base. To compensate the owner for principal and interest which it must pay to obtain funds invested to purchase the car, users should contribute no more than their proportion of the amount actually paid.

charges are not based upon an inflated book figure and should not be so inflated when passed on to users.

Where a car owner has paid part of the cost of a new car with its own funds, and recovers each year a portion of its investment from per diem receipts, the inclusion of interest on the unrecovered portion of the investment is designed to compensate for the interest which might have been earned on that amount in an equivalent alternate investment. No reason appears why that interest should be inflated with the passage of time by application of an index to the original amount invested purporting to represent the increased cost of building or buying freight cars. There is no basis in this record for a finding that possible alternative investments would have undergone any appreciation, or if they had, that the owners would have taken such advantage of it as to convert the amount into a higher figure upon which the same interest return would be computed. Interest on alternative investments would normally be received annually in the same general fashion as per diem payments, and thus undergo the same reduction in purchasing power.

We find that the construction of fair and reasonable per diem charges under modern conditions does require an allowance to car owners for the loss in purchasing power of corporate funds invested in the car. The annual cost of owning and maintaining per diem cars should include, in addition to repair and maintenance costs and provision for property taxes, a portion of the capital expended by the owner for its purchase, together with interest on the unrecovered balance, and amounts necessary to make payments of principal and interest on funds acquired through issuance of fixed liability securities to finance the purchase. Only the portion representing corporate funds invested in the car by the owner should be subject to the adjustment reflecting changes in purchasing power.

It is asserted that separation of the elements of acquisition cost in this fashion is a novel approach not considered at the hearings. The demand for increased charges based upon the use of reproduction costs, however, makes inevitable a determination as to the validity of this procedure. The order instituting docket No. 33143 identified the proceeding as an investigation under section 1(14)(a) of the act for the purpose of establishing reasonable rules, regulations, and practices with respect to determining the compensation to be paid for the use of carriers'

owned freight cars which are not owned by the using carrier. All parties were aware that the extent to which reproduction costs were to be used was one of the primary issues. The United States District Court had specifically identified this issue in remanding the proceeding in [illegible] v. United States, supra. Application of the reproduction cost index to a portion of the annual cost was the procedure used in the AAR calculations prior to 1953. There is nothing novel or unusual about its use here.

With the costs of modern cars rising and substantial portions of the price being financed, it becomes essential to a just and fair result that a reasonable measurement be made of the annual portion which is actually affected by inflation. In referring to a fair return on value, Congress did not intend that car owners were to be compensated for fictitious costs. Such would be the result of computing charges for depreciation and interest using the reproduction cost and depreciated reproduction cost, respectively, of the car, without consideration of the portion of the cost actually representative of the owner's investment. Unless we are to find that per diem charges shall be computed solely and directly on the original cost of the car, no choice exists but to consider the various means by which the funds are obtained to acquire cars and the extent to which they produce a real cost to the purchaser.

Much of the argument in support of a blanket application of reproduction cost is founded in a "value of use" concept which, as we have pointed out, is inappropriate for application to the activity with which we are concerned. It would require users, whether using the car in a joint move participated in by the owner, in a revenue move not participated in by the owner, or returning the car empty in a non-revenue move, to pay the owner the full amount, including profit, that the owner could get from on-line use of the car. The legislative history of the 1966 amendment to section 1(18)(a) clearly prohibits any allowance based upon this concept. See [illegible] May 12, 1966, page [illegible].

Those respondents who support application of reproduction cost in full and use of higher rates of interest assert that these are necessary due to the failure of new, more attractive cars to be returned to the owner's line with satisfactory frequency. Experience of some railroads indicates that such cars spend a greater proportion of the year off-line than older, and perhaps less de-

strable cars. The record is not in sufficient detail, however, to support findings with respect to the actual loss of remunerative use suffered by the owners in such cases. The higher days-off-line record of the newer cars may, to some extent, be the product of their prompt reloading and forwarding by the owner when received back from a prior movement. Pending changes in the car-service rules may result in improved return of cars to owning lines but, to the extent that an owner fails to obtain the amount of productive use of a new car reasonably to be expected in interchange service, in light of the requirements of its shippers, the answer is not to require all users of all cars to pay excessive charges. Improvement in car service rules and diligence in their enforcement is required.

Another ownership risk, for which compensation is sought by use of reproduction costs, is that associated with premature obsolescence due to traffic changes or technological progress, and that associated with reduced economic activity resulting in lack of revenue producing employment for the car. This cost, however, is already borne by all users, due to the manner in which the ownership cost is distributed. The car-day dividend excludes a large percentage of home surplus and bad order cars, on owner's lines, while the dividend includes the costs of all cars. The quotient is thus enlarged so as to spread over all days of active cars a ratable portion of the costs of cars for which current employment is not available or feasible. Owners having home cars on line, now in use by reason of the above-mentioned risks, receive in the daily car-rental payments for cars in active use a share of the costs of the idle cars.

We have found that the average investment by car owners in the original acquisition cost of cars is 20 percent and that, in general, the principal amount of equipment obligations is required to be paid in 15 years. While precise reimbursement of the ownership burden would require proportionate contribution of the costs of ownership in the same amounts and within the same period of time that they must be met by the owner, the record demonstrates that car owners have not generally viewed reimbursement with such precision as essential to equitable treatment. By spreading the recovery of capital costs over a 30-year period, the impact of car-hire charges on users has been mitigated and, although the immediate return to the owners has been somewhat lessened, the total receipts over the 30-year period have been greater than would have been received by using a

shorter period. In general, freight cars have been kept in active service at least that same length of time. Since all owners are users, and nearly all users are owners, the acceptance of the discrepancy between the manner in which the owner must meet the burden and the manner in which it is reimbursed, indicates an accommodation of interests which has produced a practical equity entitled to substantial weight in the disposition of these proceedings.

Where an owner finances a substantial part of the original cost of the car, and is required to meet annual payments of principal and interest spread over a period of 15 years, contributions from car users based upon a depreciation allowance spread over a period of 30 years require the owner to carry the difference between its payments and the annual contribution by users. This is additional contribution by the owner to the capital cost of the car which must be recognized. An allowance for interest on these added sums, and for inflationary impact thereon, is appropriate. The examiner concluded that reasonable compensation to owners would be accomplished by allowing interest and application of reproduction costs to 40 percent of the original cost over the 30-year period, and treating the remaining 60 percent of the original cost as funds upon which changes in dollar values had no impact upon car owners. In so doing he allowed car owners to recoup in the last 15 years for excess amounts paid by them during the first 15 years.

Table I, below, shows the approximate average annual costs per $1,000 of original cost where recovery of 40 percent is accomplished within 15 years, including interest at 4 percent; all other costs being spread over a 30-year period. Table II allows 60 percent as the financed amount and spreads all costs over the 30-year period.

In table I the reproduction cost index is applied only to the 40-percent average original investment of the car owner, while in table II it is applied to 60 percent of the original cost for the entire period.[3] In each table, taxes are spread over the 30-year period. Where 40 percent of original cost is treated as the investment of corporate funds by the owner, and 60 percent is spread over 30 years instead of 15, compensation is lower during the first 15 years per $1,000 of original cost is approximately $200 less than shown on table I. This amount is more than

recovered before the 20th year, however, and in subsequent years the additional amounts are sufficient to compensate for the use of the added fund.

Per diem charges constructed strictly in accordance with table I would result in substantial variations in revenues, with an excessive reduction occurring in the 16th year. We consider that charges generally constructed as shown in table II to be superior. The choice herein made is obviously not the product of exact measurement. Were the costs and apportionments involved herein susceptible of precise and indisputable calculations and application, there would be no need for recourse to this Commission. It is the existence of these numerous and extensive areas of imprecision, as well as the opposing theories as to methods of calculating and distributing the costs that make necessary the application of expertise and judgment. We find that allowance for inflation on 40 percent of the original cost over the 30-year depreciation period results in the payment by car users of just and reasonable compensation to car owners for the burden resulting from decreased purchasing power of their invested funds. See [illegible] 387 U.S. 326 (1967). As pointed out in [illegible] 329 I.C.C. 466, 478, the distinctions in relationships of the parties require treatment of this problem which, while differing, is not inconsistent with our conclusions herein.

Calculations of certain parties which purport to support higher per diem charges by allowing reproduction costs on the car owner's increasing equity over the life of the car are not persuasive. This increasing equity is a benefit which accrues to the owner by virtue of the contributions of the users. If the car is off line the entire year, the entire additional equity beyond the original owner's downpayment is paid by users. No logical basis exists for requiring them to pay also additional amounts due to the subsequent depreciation in purchasing power of funds which they themselves contributed and which funds were themselves raised to adjust for such changes. That the car obtaining line receives the benefit of sole ownership when purchase obligations are terminated gives it no additional right to payment from the others.

In fact, it is more common for cars to be off line only part of each year, and during the time they are on the owner's line

other railroads are not contributing to their cost. During these periods, however, the owner is the user and payments made by him on the purchase obligations perform the same function as contributions by other users. The end to be attained is the fair reimbursement of the owner for those amounts which it actually pays as owner, over and above contributions, or constructive contributions, which it makes in its capacity as user. The increase in its proportionate ownership of the car over the latter's operating life provides no measure of this amount. Notwithstanding the attempts made to suggest some differing relationship, we are of the view that the use of per diem freight cars is made pursuant to a relationship in the nature of a partnership, wherein all users, including owners, contribute their share of the ownership obligations, proportionate to the use made by them.

The index of freight car costs used as a measure of the reduction in the purchasing power of the invested sums is the product of a joint effort by the Association of American Railroads and the Commission's Bureau of Accounts, Section of Valuation, 16 and is one of several established after analysis of major construction contracts, reports by carriers, and information furnished by equipment suppliers and manufacturers. Some 44 separate indexes are published by the Section of Valuation and Depreciation to correspond with specific primary accounts of railroads, as set out in the Uniform System of Accounts for Railroad Companies. The index involved herein is that published for Account No. 53, freight train cars. It purports to show the relationship of prices for each year subsequent to 1914, using the prices in the 1910-14 period as 100. The index for each year is a composite figure based upon the percentage of each type of car and equipment in the account.

While the record contains little in way of detail as to the construction of this index, the testimony of a former Director of the Commission's Bureau of Transport Economics and Statistics that although extras are omitted, items such as wide doors, greater length, bigger volume, steel roller bearings, cushioned underframe, et cetera which are an integral part of new cars, are included in the average costs which underlie the index, was not contradicted. It also appears that the index includes other improvements which form integral parts of new cars such as improved metallurgical design of wheels, self-aligning trucks with one-piece cast steel pedestal [illegible] cast steel side frames with integral journal boxes, stabilizing devices, snubbing features built into side frames, wear plates in critical wear areas, journal roller bearings, improved coupler designed and draft gears design advances.

In a period during which no appreciable changes occurred in the design, size, or equipment of freight cars, the Account 53 index of construction costs might be treated as a reasonably reliable measure of reproduction cost and, under average economic conditions, of changes in the purchasing power of dollars invested in freight cars. In periods such as we have experienced since 1941, however, we think this index must be treated with caution and indications of inflation resulting from its application to original costs employed only as approximations. The

many changes in manufacturing processes, metallurgical developments, changes in design and structure, et cetera which have occurred are reflected to an immeasurable extent. Under these conditions, these approximations decline in validity as they are applied to more distant past years. Beyond a limited past period we are of the opinion that this index produces increases in reproduction costs which are so indeterminate as to render them unsatisfactory as measures of per diem costs. Thus, a more equitable method of allowing car owners to recover for the effect of inflationary forces is to make an appropriate increase in the rate of interest allowed on their invested funds which approximates the impact indicated by the index in more recent years but modifies the indication for more distant periods. In the following calculations, capital charges have been computed in this fashion.

INTEREST RATES

In addition to allowing application of the reproduction costs to 40 percent of the original cost, the examiner allowed an interest rate of 4 percent after taxes on the unreimbursed balance of 40 percent of the original cost. It is contended by some respondents that this was excessive, while others assert that it was too low. We do not find persuasive the evidence of interest on investment allegedly earned by car leasing companies, particularly in the absence of information as to the base on which it is earned, the accounting process which produced the asserted rate, and the extent to which an element of profit is contained therein. A most strenuous argument is made, however, that the per diem charge should contain an allowance for what has been referred to as "economic cost." In this respect it is argued that an allowance of 4 percent after taxes on that portion of the original cost of the car representative of the owner's investment of its own funds is inadequate. The cost of this "equity capital" is said to be much higher.

The general funds of the railroad company employed to make the investment in cars, in addition to retained earnings, are derived from long-term debt capital sources and proceeds from the issuance of stock. The cost of long-term debt capital is made up of the average yield, the premium necessary to attract buyers, underwriters' fees and corporation expenses of issuance

and distribution, less credit for income taxes, expressed as a rate of interest on the principal amount. While we have required to be stricken certain evidence first offered in exceptions, we note that, even if received, it would not warrant a finding that the allowance of 4 percent after taxes is inadequate to cover the costs of this source of corporate funds. A similar calculation of the costs involved in raising capital by issuance of stock, covering the corporation costs of issuance and servicing, underwriters' and brokers' commissions and discounts, and the necessary underpricing, would develop the rate necessary to compensate for this item, but no evidence is of record on this point. For reasons hereinafter mentioned, we are satisfied that costs of this latter type will also be adequately compensated by the allowances herein made.

The substantially higher rate of interest measured by the "cost of equity capital," as this term is used by the proponents, is supported by a theory which was rejected by the examiner as a method appropriate to evaluation of investment choices but inappropriate for application to the per diem calculation. The "cost of equity capital" which we are urged to adopt is not the cost which the railroad must incur to issue and market the stock, but is the interest rate thereon which states the discounted cash flow return to stockholders in the form of dividends plus market appreciation, adjusted upward by a factor for underpricing, underwriters' and brokers' commissions, and corporation expenses. This "cost" purports to measure investors' expectations and provide a yardstick by which to measure the utility to the company of future capital investments, in order to hold earnings up to the estimated expectations of investors, thus insuring maintenance of the company's financial standing and ability to obtain future capital inflow at costs acceptable to its particular management. Obviously, this "cost" includes all the profit obtainable or desirable from operations of the capital investment under consideration. There is no evidence that consideration of prospective net per diem revenue is so significant a factor in the financial planning of railroads when considering investment in new freight cars as to require rates generated by the method just described. On the contrary, it must be found that freight cars are built to meet anticipated needs of shippers and to earn freight revenues, and that little consideration, if any, is given to the possible income from per diem payments in the

decision to acquire cars. We find that the "cost" herein described may not reasonably be employed as part of the ownership cost of per diem cars for purposes of calculating the charges to users.

A rate of 4 percent after Federal income taxes is reasonably related to the return generally available from investments having similar risks. It compares with a return earned by railroads from freight service in 1960 of 4.5 percent after taxes and our conclusions in cases of similar reciprocal charges based upon cost, that 4 percent after taxes produced a fair return on value. *Switching at Richmond, Va.*, 245 I.C.C. 293, 298; *Switching Charges at Detroit, Mich.*, 301 I.C.C. 75, 82; *Routing Cancellation at Waterloo, Iowa*, 302 I.C.C. 477, 485. A fair return on the present value of the owner's investment requires consideration of the changes which are reflected in the Account No. 53 index of freight car costs and generally shown in tables I and II, *supra*. Employing this index as a guide, we conclude that interest at a rate of 9 percent before taxes on the portion of original cost herein allowed as representative of the average ownership investment, which produces approximately 5.5 percent after taxes, provides a fair return on the value of the investment, adequately compensates owners for the impact of inflation, and includes those elements of cost which should be shared by car users.

The average interest rate on outstanding equipment obligations developed by the 1960 studies was 3.849 percent. We agree with the examiner that a rate of 4 percent before taxes is reasonable for application to the portion of original cost of cars herein treated as funds not risked by the car owner and with respect to which the owner has a fixed liability. We find that allowance of 4 percent in this fashion is adequate on the average to reimburse car owners for interest payments which they must make on equipment obligations and constitutes just and reasonable compensation therefor.

The combination of an allowance of 4 percent on 60 percent of the original cost and 9 percent on the remaining 40 percent, produces a composite rate of 6 percent for application to the undepreciated balance of the original cost. A calculation based upon this figure appears subsequently herein as table B, and indicates cost which are closely related to those shown in tables I and II. The abrupt reduction in the 16th year shown in table I is avoided and, while charges are somewhat higher than table II in the earlier years, the speculative impact of the reproduction

cost index in the more distant years is mitigated. We find that an interest rate of 6 percent before taxes upon the undepreciated balance of the original cost of cars is just and reasonable compensation to car owners for all costs of interest on invested and borrowed funds, including a fair return on the value of their investment and allowance for losses in purchasing power of invested funds, under circumstances where per diem charges are calculated separately with relation to the actual original cost of cars.

### COST BRACKETS

Compensation to owners would most nearly be accomplished by measuring the car rental rate for each car according to its particular cost. Such a method would require rate schedules so complex as to defeat their purpose, however, and some grouping of cars is essential to a practicable system. To be reasonable, the groupings chosen should be so constructed as to contain cars having values reasonably related to the value employed to compute the rate for that group. The groupings, or value brackets, employed in constructing the AAR multilevel rates are challenged as unreasonable both because of their size and because the rates applicable to some are weighted to reflect the preponderance of cars in the lower portion of the bracket. The analysis of 974,386 cars used by the AAR in developing these brackets and rates is set forth below. Values shown are based on the average original cost, plus additions and betterments, depreciated, as of December 31, 1961.

| Value group | Number of cars | Distribution |
|---|---|---|
| *1* | | *Percent* |
| $1,000 and less | 380,851 | 100 |
| *2* | | |
| 1,001– 2,000 | 150,160 | 36.94 |
| 2,001– 3,000 | 112,112 | 27.58 |
| 3,001– 4,000 | 77,776 | 19.14 |
| 4,001– 5,000 | 66,406 | 16.34 |
| | | 100.00 |
| *3* | | |
| 5,001– 6,000 | 39,031 | 24.58 |
| 6,001– 7,000 | 36,459 | 22.96 |
| 7,001– 8,000 | 40,461 | 25.50 |
| 8,001– 9,000 | 26,818 | 16.89 |
| 9,001–10,000 | 15,992 | 10.07 |
| | | 100.00 |

| Value group | Number of cars | Distribution |
|---|---|---|
| | | *Percent* |
| 4 | | |
| 10,001–11,000 | 11,155 | 43.24 |
| 11,001–12,000 | 6,930 | 26.87 |
| 12,001–13,000 | 4,999 | 19.38 |
| 13,001–14,000 | 1,939 | 7.52 |
| 14,001–15,000 | 770 | 2.99 |
| | | 100.00 |
| 5 | | |
| 15,001–20,000 | 1,280 | No analysis |
| 6 | | |
| Over 20,000 | 1,247 | No analysis |

It is pointed out that, with brackets of this width, cars having actual values placing them at the upper end of the bracket do not receive compensation for their true costs. An example is a TOFC car valued at $13,253, assigned to bracket No. 4 when installed in per diem service, which would recover in that year as interest, using 6.62 percent, approximately $768, compared with $877 based on its actual cost. The rates applicable to bracket Nos. 1, 5, and 6, [17] were based on the average ownership costs, using the reproduction value basis. In bracket Nos. 2, 3, and 4, however, the cars were arranged in subgroups of $1,000 each, as shown above, and the weighted average used. Thus, in bracket No. 4, the arithmetical average of the five subgroups is approximately 474.22 cents per active car day, while the rate of 450 cents results from the preponderance of cars in the lower portion of the group. The rate reflects the cost, as computed by the AAR, for a car of slightly under $11,000 in value. Of some 25,793 cars in this group, over 7,700, or nearly 30 percent, have values exceeding $12,000 and would not be compensated by rates measured by the costs of an $11,000 car. Using as a basis the same AAR calculations which underlie the multilevel rates, cars having values between $12,000 and $15,000, which receive $4.50 per day, incur costs between $4.70 and $5.24 per day. In bracket No. 3, cars receiving $3.58 per day incur costs ranging from $3.38 to $4.12 per day.

The applicable rates under the AAR multilevel plan change throughout the life of the car by reference to the assumed reduc-

[17] Bracket No. 6 as used here refers to the original publication of January 1, 1964, in which this bracket encompassed all cars over $20,000 in value.

tion in the car's value as measured by its depreciated original cost. Since the method contemplates the annual reduction in the car value it comprehends a period of time when its value exceeds that of the weighted average, and a subsequent period of time when its value will be below that upon which the rate is calculated. To some extent, therefore, the lack of full compensation during the period the car is valued at more than the weighted average car in the bracket is balanced by the excess of compensation during the period the car is below that value. Under this system, however, it will generally be equal only by coincidence.[18] Value brackets which are of such breadth as to apply a single rate to cars having costs of the variability indicated by the AAR calculations are productive of charges which are unrelated to the ownership costs, and are unreasonable.

The use of changes in the depreciated balance of the original cost of each car as basis for changes in the rates was found by the examiner to produce an erratic progression from rate to rate and, taken in connection with the substantial difference in rates in each bracket, unreliable as a measure of changes in the ownership costs. The progression of cars through the AAR multilevel value brackets, and the returns obtained while in each bracket, are not shown to have any relation to the progression of changes in the costs of ownership in those periods or any consistent relation to the actual amounts of such costs. The more particular consideration of the costs of acquiring cars which we have found necessary under present conditions and the fact that such costs vary with time rather than with a depreciation schedule lead us to conclude that any schedule of changes in rates over the years a car is in service should be measured directly by the passage of time.[19] A system making use of the latter method places a car in a value bracket based upon its original cost, where it may remain. Since there is no progression downward through the bracket in such case, it is even more important

[18] Taking the $13,254 car mentioned above as an example, this car would depreciate $397.60 per year, allowing 10 percent for salvage. For the first 6 years its value would exceed $11,000. In the 7th year it would approximate the weighted average, and in the 8th and 9th it would be below. In the 10th year it would drop to the next lower bracket, having received 6 years of varying undercompensation in exchange for 2 years of varying overcompensation.

[19] Measurement of car age is required under the AAR multilevel system in order to use the Account No. 53 index in setting the reproduction cost ascribed to cars in each value bracket. Evidence of car leases with the Equitable Life Assurance Society between 1950 and 1962 show rates graduated with the age of the car, separated into five 3-year periods and one 10-year period.

that the value used to calculate the cost of each bracket closely approximates the cost of the cars therein. Necessarily, narrower brackets are required. We find that brackets no more than $2,000 in width with rates calculated upon the middle value of each, are necessary to satisfy this requirement.

ADDITIVES

Classification of cars into nine groups under the present multilevel rates is based upon their original cost plus additions and betterments, depreciated. Where cars were built or rebuilt in the carriers' own shops, this base figure varies due to differences in accounting systems and the extent to which all costs associated with the construction were capitalized. Among the items sometimes omitted in first establishing the original cost were payroll taxes, vacation pay, holiday pay, health and welfare, shop and power plant repairs and maintenance, shop depreciation, et cetera. On May 6, 1963, the AAR issued instructions and reporting forms designed to adjust the original costs as first reported, so as to reflect the omitted items. These instructions and forms were revised by a second letter on June 25, 1963. The amounts reported in response thereto are referred to as "additives."

Southern Railway contends that the use of additives to increase the original cost fugure is unlawful because not authorized by vote of the members of the per diem agreement. It is also contended that the system established by the AAR to revise the original capitalized cost of cars by use of additives lacks a uniform basis, lacks consistency with rational accounting policies and practices, and fails to provide an effective audit. It is said to violate accepted cost accounting principles and to introduce such error into charges under the multilevel rates as to render them unreasonable and unlawful.

Since we have found it necessary to prescribe the per diem methods to be used for the future, it is not necessary to give detailed consideration to these issues. Classification of freight cars into value brackets shall, for the future, be on the basis of their original cost, undepreciated, determined in accordance with the Uniform System of Accounts for Railroad Companies, prescribed by us in accordance with section 20 of the act and set forth in 49 CFR chapter 1, subchapter A, part 10. To the extent that these

regulations do not include items of expense which might be capitalized under appropriate controls, the respondents may take appropriate steps to request revisions which they deem appropriate.

When the multilevel rates became effective on January 1, 1964, there was included a method of reporting which attempted to compensate owners for the extra cost of additions and betterments. Additions and betterments made prior to the time the cars were first reported for inclusion in the master list were coupled with the depreciated cost of the car and additives, if any, to establish the value bracket in which it was to be placed. Subsequent additions and betterments were to be reported on change reports and added to the original valuation, with the anticipated result of either moving the car to a higher bracket or retaining it for a longer time in its then present bracket. Prior to the institution of the multilevel rates, in 1964, the per diem rates and underlying calculations did not purport to reimburse the owner specifically for such costs. Very little evidence was introduced to assist the Commission in dealing with these costs, and the record suggests that owners have not been particularly concerned with obtaining reimbursement for them. Nor are they provided for in the per diem system suggested by Southern Railway in this proceeding.

We agree with the finding of the examiner that the procedure employed under the AAR multilevel system is inadequate. In his recommended report and order the examiner suggested another method of reimbursing owners but noted that other methods, or evidence that it would be more economical to ignore these costs, should be brought to the attention of the Commission. No significant attention has been given to this matter by the parties in their subsequent pleadings and, upon the record, we conclude that there is not sufficient interest on the part of the respondents in recovering these expenditures by way of per diem contributions to justify provision therefor at this time.[20]

### IMPACT OF MILEAGE

For over 60 years the annual ownership burden has been distributed among car users based upon the number of days each

[20] We note that expensing of such of these costs as may be permitted by current regulations makes them a part of the overall costs entering into calculation of the per diem rate and may, in the light of tax considerations, be considered preferable by the respondents.

had the car on line. It is not disputed, however, that a substantial portion of the repair and maintenance expenses arises from and is proportionate to the amount of use to which the car is put while on line, rather than to the days held. By most respondents, this use is grouped into three categories, i.e., line-haul movement, switching movement, and loading and unloading. No practicable method was shown by which repair expenses due to loading and unloading activity could be apportioned among the car users other than by time on line, as at present. A similar conclusion is required with respect to switching service. It is contended that switching service causes substantially more damage to cars per mile of movement than does line-haul mileage but the evidence is conflicting on this point.[21] Records are not maintained of mileages of cars in switching service and we do not consider it practicable at this time to require that this be done. We find that distribution of repair and maintenance expenses which arise from switching service and loading and unloading activities in relation to the number of days cars are held on line will provide a just and reasonable sharing of these costs.

The use made of cars involved in line-haul movement is susceptible of measurement, however, and the record herein shows that the average distances active foreign per diem cars are moved by the respondents vary widely. Differences of as much as 100 miles are shown by the 1960 special studies, a few of which are shown below.[22]

| Carrier | Daily average mileage |
|---|---|
| L. I. | 4.8 |
| NY,NH&H | 34.6 |
| B&O | 44.5 |
| B&M | 51.2 |

[21] The Section of Cost Finding employed a factor designated "equated switching miles." This is an artificial figure which must be estimated due to the fact that records are not maintained of car-mileages in switching movements. It was developed from data in Rail Form A, which indicated that for each locomotive mile in switching service, there were 3.3 car-miles. The mileage is then further increased by application of a "rough usage" factor of 2.6 intended to represent the relationship of wear and tear on the car in switching service to line-haul service. The result is to increase locomotive miles in switching service 8.6 times, to develop car-miles in switching service. Validity of the "rough usage" factor was not shown.

[22] Movements of particular scheduled trains of as much as 450 miles per day occur.

| Carrier | Daily average mileage |
|---|---|
| PRR | 51.3 |
| NYC | 51.8 |
| C&O | 53.9 |
| L&N | 59.5 |
| ACL | 62.8 |
| N&W | 66.6 |
| C,B&Q | 75.2 |
| Sou. Ry | 70.4 |
| MP | 80.1 |
| NP | 81.4 |
| SP | 112.4 |
| ATSF | 113.2 |
| UP | 120.9 |

Line-haul mileage also furnishes an indication of the benefit which car users derive from per diem cars, since the divisions which carriers receive of the freight revenues are customarily based in large part upon distance scales. Factors prescribed by the Commission for application to rate scales in ascertaining these divisions increase with increases in distance. As discussed hereinafter, line-haul mileage has an appreciable impact upon reduction in car value and cost of repairs, both of which are factors entering into the per diem rate. It is of importance therefore both due to the greater revenues obtained from the transportation of the car over longer distances and to the greater impact on the ownership burden which results from the longer movements.

The record includes 19 analyses of car repair and maintenance costs, a description of which appears in the appendix to this report. Most of these were calculated by separate consideration of each portion of the car, the factors which cause wear or damage, and the relative extent of each. They were not, however, based upon tests or studies of equipment in operation under test conditions. The proportions assigned to the various causes were determined by the judgment of the engineering official or officials responsible therefor in each instance. The conclusions of the Section of Valuation and Depreciation represent the judgment of staff personnel in revising a similar allocation made in 1940, and published in statement No. 4-54, November, 1954. Comparison of the individual judgments reveals appreciable and irreconcilable differences of opinion as to the cause of particular repairs and to the totals

in each group. Even when the carriers are grouped by the broad geographical areas in which they operate, or their type of service, no consistent pattern appears.

The lowest estimate of the percentage of repairs caused by line-haul mileage in these analyses is about 20 percent. The average of estimates for all three classes of cars is about 38 percent, and the majority of the estimates for this factor are between 30 and 40 percent. Estimates by the Pennsylvania Railroad, and those used by the Section of Cost Finding, do not separate switching from line haul, but employ approximately 70 percent as the combined effect of these two causes. Although the repairs necessitated by switching service are considered, by many witnesses, to exceed those necessitated by line-haul service on a mile-for-mile basis, there is no agreement as to the extent of the difference. Equated car-miles of per diem cars in switching service, as calculated by the Section of Cost Finding for 1960, were 2,114,616,465, while total line-haul and equated switching miles were 23,790,915,732 The approximate 10 percent of equated switching miles indicates that about 63 of the 70 percent repairs assigned to the two causes was related to line-haul mileage. Both the Pennsylvania and the New York Central, which also estimate a high proportion of repair costs to line haul, are proponents of the use of mileage as a measure of allocating the ownership burden among users. The 16 respondents which joined in the studies summarized in the appendix are all opposed to this procedure. Some of these respondents, however, estimated that line-haul mileage causes from 46 to 60 percent of repair costs. The examiner found that 50 percent of annual repair costs might reasonably be treated as related to the line-haul mileage over which the cars are moved.

This finding is challenged as being a judgment figure, unsupported by the evidence. We are satisfied from a review of the entire record that a judgment decision is required by the very nature of the problem. All the evidence is based upon judgment of the witnesses. The record is convincing that line-haul mileage is the cause of a significant portion of the repair and maintenance costs of cars, that no objective standard of demonstrated reliability exists to ascertain the proportion, but that a considered evaluation of the judgment of a number of experienced witnesses provides a basis for reaching a reasonable and equitable conclusion. We find that the usage made of

foreign per diem cars, measured in terms of line-haul mileage of active cars, is so varied as to require separate treatment and is a significant factor which must be reflected in the distribution of the annual burden among users of the cars. We further find that 50 percent of the annual repair and maintenance costs should be distributed among car users in relation to the line-haul miles over which they move such cars.

It is contended that since regular repairs are made at current prices, freight cars do not lose value because of physical deterioration, and the loss in value charged to depreciation is caused by obsolescence due solely to the passage of time. That a freight car can be kept in useable condition for extremely long periods of time by frequent repairs and careful maintenance does not alter the fact that at the time it is retired it has a salvage value which is only a small percentage of its original value. It cannot be found that repairs during its operating life bring it back regularly to the value and condition it possessed when new. The decision to retire a car, or group of cars, involves the balancing of a number of factors, and a determination as to whether more profitable future operations will result from expending funds to keep the cars in operation, or in expending such funds to purchase replacements. Inherent in the analysis is consideration of the physical condition of the car, the extent of deterioration, and the cost of keeping it in useable condition. The theory that no part of the loss in value of a car at retirement results from deterioration in its physical condition and ability to perform adequate service, due to wear and tear in use, cannot be accepted. Use of the term depreciation as a word of art in the accounting field, to mean a charge made on a time basis without regard to use, does not foreclose consideration of the causes of the loss in value.

Both the annual repair and maintenance costs and the loss in value of the car not restored by such repairs are found to be directly affected by the use made of the car. The evidence on the latter point is limited to an analysis by the Commission's Section of Valuation and Depreciation and is based upon a value per pound concept similar to that employed by the respondents in settling claims among themselves for destroyed cars. The Section of Valuation and Depreciation calculated the combined effect of line-haul and equated switching miles as the cause of 45 percent of loss in value of the car. Applying the ratio of equated switching miles to total miles mentioned above, we

find that 40 percent of the loss in value is properly allocated to the effect of line-haul mileage and should be so distributed among car users. For the reasons heretofore stated, the remainder of the depreciation charge must be assigned to time on line.

In the allocation of various cost items between time and mileage, the examiner found that charges for depreciation, interest, and taxes on repair facilities, payroll taxes, and interest on working capital should be assigned solely to time. Considered individually, each of these items appears more closely related to the passage of time and, in most cases, it is difficult to attribute any portion to the direct, measurable impact of car-mileage. Nonetheless, all of these items constitute overhead on the repair expense, which is shown to have a direct and reasonably measurable causal relation to mileage. While the difference in the result is not great, we believe it feasible to treat the charges associated with the repair function in the same fashion and to distribute these particular items between time and mileage in the same proportion as the direct repair costs. In the calculations which follow this procedure has been employed.

Proponents of rates measured solely by the number of days the user retains the car contend that the benefit therefrom in encouraging the movement of cars and assert that this method most effectively aids the national policy of improving car supply and service. We have already called attention to the fact that our function in this proceeding is to determine reasonable rates which must be fair and equitable to all parties. Secondary results, however beneficial, cannot be transformed into a principle to govern the determination of the rates in this case.

It is also asserted that the respondents desiring calculations of the rates solely upon a daily basis outnumber those who seek rates measured both by time and mileage. The accuracy of this assertion cannot be determined since we do not have of record the positions of numerous short lines. Our duty herein cannot be discharged merely by reference to the desires of a majority, no matter how great.

Considerable emphasis is placed upon the simplicity of the time-only system and the added cost involved in accounting for mileage of cars. Calculation of rates on a mileage basis is employed by the respondents with respect to many cars, particularly refrigerator and tank cars. Maintenance of records of

car-mileages by car is an established function of the respondents' staffs. At least one respondent, the Chicago, Milwaukee, St. Paul & Pacific, maintains mileage records of all cars, including foreign per diem cars. The record reveals that with few exceptions, automatic data processing machinery is employed for this as well as other elements of per diem accounting. As of March 31, 1964, owners of approximately 1,180,000 cars in interchange service employed tapes and high-speed computers to process the car rental calculations. Owners of 303,513 cars employed punch card data and appropriate processing machinery. Only about 62,171 cars appeared to be still processed manually. Recording and reporting procedures designed to handle the relatively new multirate system are in operation, including a system of reporting costs of cars to the AAR for classification in value groups. Master lists of the cars in per diem service and periodical revisions thereof are issued in form suitable for computer application. It is found that the respondents are capable of administering a system of rates based both upon the time foreign cars spend on line and the mileage traveled.

Fourteen respondents submitted estimates of the additional costs they expected to incur, separated between costs of data processing, car accounting clerks, and traveling auditors. Of the total costs as then estimated, on an annual basis, after reprogramming and other one-time costs are met,[23] the data processing amounts to slightly over $400,000 or about 15 percent of the total. Additional car accounting clerks are estimated to cost over $950,000 annually, or about 37 percent of the total, and traveling auditors some $1,245,000, or 48 percent. By applying the relationship of per diem payments and receipts for all class I line-haul railroads for the year 1961, to the payments and receipts of these 14 carriers, it is estimated that the overall additional costs to account for mileage of foreign cars, as well as time, would exceed $8,300,000 per year.

This amount is challenged by the Pennsylvania Railroad. Like most of the others, the Pennsylvania considers that additional time of computers and related machines would be required, as well as additional operators; that additional car accounting

[23] Only four carriers in this group indicated their expected one-time costs for the data processing function. C&O estimated $20,320, D&RGW estimated $750, UP estimated $15,000, and SP estimated $20,909.88.

clerks would be necessary and that traveling auditors would be required to check the records of PRR cars on foreign lines. It points out that a change to a time-mile system would require revisions in the rules governing per diem settlements, just as changes were required in 1964 when the multiple-level system was substituted for the single-rate system. Applying the suggested revisions to its own operations, it estimates additional costs of $109,000, and savings of $30,000, for a net of $79,000 in extra costs for time-mileage accounting. Expanded in similar fashion as was used by the 14-carrier study, the Pennsylvania estimates the increase for all class I line-haul carriers at not over $1 million.

The additional employees and costs for data processing are required by and related to the additional accounting for foreign car movements on line. The additional costs for traveling auditors arise because of the desire to check mileages of owned cars when off line. Services of additional car accounting clerks are required by functions related to both causes.[24] The estimates of these additional costs are based on the judgment of officials of the carriers and contain many conflicts and inconsistencies.

The largest single item of additional cost is the provision of traveling auditors to investigate the records of other railroads as deemed necessary to insure receipt of all earned per diem payments. This is considered necessary since the owning railroad will not have a record of the distances its cars travel over other lines and will have no other method of checking on statements of amounts payable by such lines. The auditing of mileage records would be accomplished on a sampling basis, and it is generally conceded that as experience proved certain carriers' records to be reasonably reliable, auditing of their accounts would be reduced. The volume of the records involved in this process is such as to render improbable any concerted falsification of accounts, and no contention is made that carriers would engage in such practices. By the same token, the number of records, and the number of employees participating in their making, makes errors not improbable. Individual errors in mileage reports would not ordinarily be substantial in amount,

[24] The additional car accounting personnel will perform some functions involving correspondence with other lines regarding car rental claims, but their anticipated primary activity will be checking on omissions of foreign car movements appearing in wheel reports on their own lines.

however, and it is unlikely that the sums allegedly required for auditing as estimated by several of the carriers would be justified by the recoveries they might develop.

Many respondents expressed disapproval of delegation of the auditing function to an outside group. Most felt that each railroad should look after its own interests. While this system was feasible under the system of single daily rates prior to 1964, it deserves reconsideration in the light of present conditions. Auditing of car-mileages by each railroad separately suggests an operation both inefficient and uneconomical, and one which might be better performed by an independent organization.

No evidence was offered to show the total costs of accounting for per diem by individual or all carriers, either under the single rate which prevailed prior to 1964, or under the present multilevel rates. Per diem payable in 1960 by all carriers amounted to $679,506,750, and in 1961, $731,000,998. The analysis presented by Pennsylvania Railroad suggests that the additional cost of the time mileage accounting will be less than one-seventh of 1 percent of the total sum involved. Even if the figure computed by those opposing the mileage system is accepted, the amount is little over 1 percent. We find that recognition of the line-haul mileage factor is feasible under present conditions and can be accomplished without unreasonable increase in the difficulty or cost of reporting and accounting.

### CAR DAY DIVISOR

Reduction of the total annual cost of car ownership to an amount per car per day requires ascertainment of the number of car days to be used as a divisor. It has been customary to exclude from total possible car days, the car days of cars on owner's lines which are unserviceable and of those which, for lack of employment, are considered surplus. In this fashion, the cost of the per diem fleet is spread over and borne by the cars held by users or being used by the owner. Two special studies in 1960 were carried out to supply working data for this purpose. The first provided a 7-day sample of car-miles, a 12-day sample of number of serviceable freight train cars on line, a 7-day sample of number of "No-Day" cars[25] on line

[25] "No-Day" cars are those for which no per diem charge accrues due to their being received after midnight and delivered before the succeeding midnight.

and of cars out of service due to repairs. The latter sample was subdivided so as to show separately cars on repair tracks undergoing or awaiting repairs, cars on repair tracks repaired and awaiting switching, cars on storage tracks awaiting switching to repair tracks, cars held in train yard awaiting movement to repair tracks, cars moving empty in trains en route to shops, cars stored awaiting disposition, and other cars.

Another 7-day sample was taken of surplus per diem cars, also subdivided to show the cause. Surplus cars were ascertained by a count of serviceable empty cars on hand at 12:01 a.m. of the next day following a test day which had not been placed for loading, and a similar count made 48 hours later of those same cars to establish the number which had not been placed for loading in the meantime. Another study called for a report from the carriers, subdivided by type of car for the year 1960, showing per diem payments and receipts, and reclaim payments and receipts, together with a report of per diem receivable by type of car, for cars on railroads outside the United States.

In developing the car-day divisor for 1960, the Section of Cost Finding averaged the total freight train cars in service at the beginning and end of the year to obtain 1,685,910 cars. Analysis of the special studies and reports heretofore described developed that 44,710 of these cars were not in per diem service, leaving 1,641,200 as the average number of per diem cars in service in 1960. There was thus indicated a possible 600,679,200 car days of per diem cars for the year. The studies of bad order cars and surplus cars developed deductions of 59,029,930 car days and 68,565,413 car days, respectively, owing to these two causes. The balance of 473,083,857 active car days, divided by 1,641,200 cars in service, produces 288.25 active car days per car for the year 1960.

The active car days per car furnishes a measure of the days, on an average that each car was engaged in revenue producing service but it is not a satisfactory measure of the days over which ownership costs should be spread. Per diem payments by users of foreign cars are made, with unimportant exceptions, for each day a foreign car is on line, whether or not in a surplus or bad order category. Payments are thus made for days excluded in the calculation of the total active car days. Since car owners are users of their own cars and, when in such capacity, should bear the user's share of ownership costs, fairness to all users requires that total ownership costs be

spread over the total days for which payments are or should be made. The 1960 studies indicated a total of 223,887,324 active car days of per diem cars on foreign lines, and a total of 237,908,943 days for which per diem was paid for such cars. The indicated ratio is 1.06263. Application of this ratio to the total active car days of all per diem cars in 1960 produced a car-day divisor of 502,715,000 per diem payable days, or about 306 per diem payable days per car for that year. Development of the car-day divisor in this manner credits all users, including owners when using their own cars, with the same relative proportions of surplus and bad order car days, while excluding the great majority of surplus and bad order car days of cars on home lines. Costs of the home bad order and surplus cars are thus spread over the payments made for the cars in use.

Certain respondents contend that distribution of the annual car costs should be accomplished by use of a car-day divisor developed by application of a fixed ratio of active cars to all cars, and recommend that 80 percent be established as the ratio to be applied. We are satisfied from the record that the car-day divisor is a factor of such significance in the distribution of per diem costs as to require more care in measurement. The determination to be made is the cost per day, to be employed to measure the adequacy of the existing rates and the need for any change. It is essential that the car utilization for the specific years be employed and no sound basis is shown for ignoring it. Its importance is underscored by evidence which indicates that further studies may demonstrate a need for use of different divisors for cars of varying types or values.

The car-day divisor employed in developing the A.A.R rates has been constructed by multiplying the 20-year average of the annual ratios of active to total cars by the number of days in the year to obtain the active car days per car per year. The figure for active cars has included all cars owned or leased in the year less bad order and surplus cars on lines of owners. For application to the total costs, the active car days per car has been multiplied by the average number of cars in use during the year. Surplus cars, both home and foreign, are based upon estimates of the empty cars on hand at loading stations at the end of each day in excess of the number needed for loading the next day. The portion thereof estimated as being foreign cars is determined, and excluded, by application of a percentage based upon a 7-day test check made in 1956,

the validity of which was not shown. Based upon a test check in 1949, the reported bad order cars are adjusted by a percentage to reflect home cars in this category not reported in regular AAR reports. Accuracy of this adjustment was not shown. The divisor also includes cabooses and other cars not used in per diem service. We find that the procedures used in the 1960 special studies are more reliable and productive of more accurate development of car-day divisors.

The 1960 studies developed the ratio of per diem payable days to total active car days by use of the days for which per diem payments were made for foreign cars. The studies showed that this figure was substantially the same as the total car days of foreign cars, the difference being about four-tenths of 1 percent. We find that the total car days of foreign cars may be employed to determine the ratio of constructive per diem payable days to total active car days of all per diem cars, and that it is unnecessary to develop separately the per diem days paid for foreign cars for this purpose. The total per diem payable days for the year under consideration shall be determined by multiplying the total active home and foreign per diem freight train car days by the ratio which the total foreign per diem car days, both serviceable and unserviceable, bears to the total active foreign per diem car days. The per diem payable days per car to be used as the car-day divisor for the year under consideration shall be determined by dividing the last-mentioned figure by the average number of such cars in service in the year.

The procedures herein prescribed require also the calculation of a car-mile divisor in order to equitably spread the costs attributable to line-haul mileage. The 1960 studies suggest that variations may occur in utilization depending upon the type of car but the evidence of record is not sufficient to support findings with respect thereto. We conclude that, for the present, the average car-mile divisor, based upon the experience of all active per diem cars, must be employed. The respondents may, if they deem it necessary, bring to our attention evidence of a need for separate determination of car-mile or car-day divisors.

The total line-haul car-miles of per diem cars in 1960 developed by the special studies was 21,264,599,477. Divided by the average number of such cars in active service, 1,641,200, indicates an average per car for the year of approximately 13,000 miles. We find that the car-mile divisor applicable to

per diem cars shall be determined for the year under consideration by dividing the total loaded and empty car-miles of per diem freight train cars by the average number of cars in service in the year.

Changes in economic conditions and demands for railroad service produce variations in the number of active car days and average line-haul miles per car from year to year. Since these figures are the divisors which reduce the annual costs to the daily and per-mile rates applied to each car, they are critical to the process with which we are concerned. It is generally accepted that frequent and violent revisions of the per diem rate are not desirable. An important consideration is the fact that while a high rate of economic activity increases the active day and mileage divisors so as to produce a lower rate, a period of recession has the opposite effect. In the latter instance, the divisors might be so reduced as to result temporarily in substantially increased rates, a consequence which is similarly undesirable. Mitigation of such possible extremes is accomplished by using average conditions. The AAR has experimented with the use of 5-, 10-, 15-, and 20-year periods to estimate the car utilization to be anticipated in the future, but there is no evidence that these periods measure the average of current car demand conditions or the norm of economic cycles.

In the light of current conditions and the continuing improvements in railroad operations and equipment, a shorter period should be more reliable and responsive. We find that a 3-year moving average will be adequate to absorb temporary fluctuations in economic conditions while reflecting longer term changes in utilization and costs. It will be employed herein to determine the car-day and car-mile divisors, and the average annual cost of repair and maintenance.

### METHOD FOR FUTURE CALCULATION

We find that just and reasonable per diem rates shall hereinafter be calculated in the following manner and subject to the following instructions.

Per diem rates shall be calculated using data for the last calendar year, and for the 3 most recent years as herein prescribed, to develop necessary statistics. Whenever such calculations indicate a need for revision of the rates, the fact shall promptly be brought to the attention of the Commission.

For the purpose of the per diem calculations, freight cars shall be classified according to the original capitalized cost, without allowance for depreciation, subject to the Commission's accounting regulations. Where cars are rebuilt and assigned new car numbers, the original cost shall be the cost as capitalized pursuant to current accounting regulations. Per diem rates shall be so calculated as to reflect differences in the original cost of the car, and differences in the annual ownership costs due to the age of the car in service. Original cost brackets shall be $2,000 in scope, as shown in the following computations (table C). Brackets covering age in service shall be 5 years in scope, as shown in the following computations (table B).

Age in service shall be calculated as follows:

(1) Cars installed prior to July 1 of any given year shall be considered to have commenced their first year in service on the preceding January 1.

(2) Cars installed after June 30 of any given year shall be charged at rates applicable to the first 5 years of service until the expiration of 5 years from the following January 1.

Per diem rates shall be separately calculated, assessed and paid with respect to the number of days cars are held on line, and with respect to the number of miles such cars are moved by users in line-haul service, such calculations to be made in conformance with principles and methods found herein to be just and reasonable. Respondents will be expected to take appropriate action to accurately record days on line and line-haul mileage of foreign per diem cars. Days shall be reckoned by subtracting the date of receipt from the date of delivery. The day of receipt shall be disregarded and payment made for the day of delivery. A road receiving and delivering a car on the same date shall not pay the daily per diem charge for that day but shall pay the appropriate charge for the line-haul mileage.

The rate applicable to each original cost bracket, except the first, shall be that applicable to the middle thousand-dollar figure thereof, herein referred to as the bracket figure, as shown in the tables which follow. The amount of annual depreciation, or recovery of original cost, of cars in each bracket shall be 3 percent of the bracket figure. Forty percent of this annual cost shall be assigned to line-haul mileage, and the remainder to the daily charge (table B).

A fair return on value shall be recovered annually by allowance of interest on invested capital. The total amount, including interest costs on freight car obligations, shall be assigned to time and shall be taken at 6 percent of the average undepreciated balance of the original cost for each 5-year period for which charges are computed (table B).

The total amount recoverable annually on account of property taxes shall be assigned to time. The ratio which all property taxes for the most recent year bears to the total railroad investment for that year shall be employed to estimate this item. The amount shall be determined by application of this ratio to the midyear value based on depreciated original cost for the middle year of each time period (table B).

The total amount recoverable annually on account of repair and maintenance costs shall be taken as the same for all cars and shall be apportioned 50 percent to time and 50 percent to line-haul mileage. All costs which are treated herein as overheads on repair costs shall be apportioned between time and mileage in the same fashion as repair and maintenance costs.

The method employed by the Section of Cost Finding to ascertain repair and maintenance cost in its analysis of 1960 cost data is based upon the most recent information with respect to extent and allocation of the various items and is embodied in summary form in a publication entitled Rail Form H, 7—62, Formula for Use in Determining Per Diem Charges For the Use of Freight-Train Cars. This form, introduced in evidence as exhibit R—5, is available to any interested person through the Bureau of Accounts of the Commission.

Employing data from Rail Form A for the year under study, and ratios and apportionments from the 1960 studies, schedule 1 of Form H separates the annual costs between per diem freight train car ownership costs, other expenses, and general overheads. Footnotes to schedule 1 contain forms to be used to calculate payroll taxes, property tax ratio, cost of handling nonrevenue freight, costs of switching bad order cars, return on investment in property other than freight-train cars, and return on working capital.

Repairs to freight train cars, account No. 314, were apportioned 75.334 percent to ownership costs based primarily on the Forms 2 and 3 studies in 1960. Other 1960 ratios and apportionments to ownership costs in schedule 1 include:

| | |
|---|---|
| Account No. 302—Repair, shop machinery | 34.170% |
| 304—Repair, power plant machinery | 22.203% |
| 305(44)—Depreciation, shop machinery | 34.170% |
| 305(45)—Depreciation, power plant machinery | 22.203% |
| 503—Hire of freight cars (net) | |
| 536—A. R. schedule 376, lines 7, 8, 9, columns c, d, e, f | 73.752% |
| 235—Repair, shops and enginehouses | 27.317% |
| 253—Repair, power plants | 24.645% |
| 257—Repair, power transmission systems | 18.722% |
| 266(20)—Depreciation, shops and enginehouses | 27.317% |
| 266(29)—Depreciation, power plants | 24.646% |
| 266(31)—Depreciation, power transmissions system | 18.722% |
| 326—Work equipment repairs | 3.057% |
| 328—Miscellaneous equipment repairs | 6.551% |
| 507/540—Work equipment rent (net) | 3.056% |
| 402—Train supplies and expenses payroll taxes | 13.876% |
| Payroll taxes | 8.925% |
| Property taxes (property other than freight cars) | 1.410% |

| | |
|---|---|
| Ratio of ton-miles of nonrevenue freight in road service applicable to equipment repair | 0.11046 |
| Freight service portion of cost of handling nonrevenue freight used for equipment repair | 78.484% |
| Percent of freight service portion applicable to ownership cost of per diem freight train cars | 42.995% |
| Ratio of return plus Federal income taxes to return excluding Federal income taxes | 1.65505 |
| Ratio of revenue freight portion of total freight operating expenses to total freight operating expenses | 0.99600 |
| Ratio of switch engine hours switching bad order cars to total switching locomotive hours | 0.4408 |
| Percent of cost of switching bad order freight train cars applicable to ownership cost of per diem freight train cars | 85.950% |
| Return on depreciated investment in property other than freight train cars | 0.891% |
| Return on working capital | 10.075% |

For application to data of years other than 1960, the following changes are made in schedule 1:

In footnote 21, line 5, the source of the ratio is changed to footnote 22, line 8, column (3), and the ratio 1.65505 stricken.

Footnote 23, line 9, column (3) shall contin a source reference which reads "footnote 22, line 9, column (3)," and the ratio 6.620% contained in column (4) is stricken.

Schedule 1 is so designed as to permit the application of ratios and apportionments developed in the 1960 studies to the data of the year under analysis. Many of these ratios and apportionments required extensive reports on the part of all participating railroads and are of such nature as to have a relatively minor effect on the ultimate per diem charges. At the same time, the activities to which they refer are of such nature as to produce substantially similar effects over long periods in the absence of radical changes in railroad operations. We conclude that the ratios and apportionments developed in the 1960 studies, not revised specifically in this report, may appropriately be used for present and future per diem cost calculations but that the respondents may, should they deem it necessary, bring to our attention at any time the need for further studies. Certain ratios are developed from data available from annual reports and use of the Rail Form A formula. No reason appears why these cannot be conveniently recomputed annually without undue effort.

We find that the method of calculating ownership costs for repair and maintenance of per diem freight train cars set forth in schedule 1 of Rail Form H, 7—62, is just and reasonable, and subject to the foregoing qualification respecting future studies, is and will be productive of a fair assignment of such costs as necessary to just compensation of car owners.

The repair and maintenance costs as separated and analyzed in schedule 1 of Rail Form H for each year shall be summarized and separated between mileage and time portions as shown in table A, below. This statistical summary table contains certain additional items which, to the extent not already mentioned, shall be ascertained as set forth below. Where the necessary data are not available through current procedures, additional reports shall be made as prescribed. Appropriate revisions of standard reporting forms will be made as indicated.

(1) The total per diem car days for the study year shall be the average number of per diem freight train cars multiplied by the number of days in that year.

The average number of per diem freight train cars in service, both owned and leased from others, shall be the average of the number of per diem cars reported by class I line-haul railroads in railroad annual report form A, schedule 417, Inventory of Equipment, Freight Train Cars, in service of the respondent at the beginning and the end of the year. Schedule 417 shall be

revised for the reporting of freight train cars by types of car design, distinguished as to those cars that are per diem cars and non-per diem cars in service of the respondent at the beginning and the end of the year, and to include the definition of per diem cars given in item 7(C), below.

(2) The total per diem car days for the study year shall be separated between home per diem cars and foreign per diem cars on the basis of the percentage distribution between home and foreign of the sum of the home per diem cars on line (serviceable plus unserviceable) and the foreign per diem cars on line (serviceable plus unserviceable) using the average of the four quarters of the year as reported on Form OS-C for class I line-haul and switching and terminal companies.

(3) The total active home per diem freight train car days for the study year shall be determined by subtracting from the total home per diem freight train car days the car days in which home cars are inactive because unserviceable or because they are surplus and not needed for movement of freight.

(4) The total active foreign per diem freight car days for the study year shall be determined by subtracting from the total foreign per diem freight train car days the car days in which foreign cars are inactive because unserviceable or because they are surplus and not needed for movement of freight.

(5) The total constructive per diem payable days for the study year shall be determined by multiplying the sum of the total active home per diem freight train car days plus the total active foreign per diem freight train car days by the ratio which the total foreign per diem car days (serviceable plus unserviceable) bears to the total active foreign per diem freight train car days.

(6) Quarterly reports of Motive Power and Car Equipment, Form OS-C, filed by class I railroads, including switching and terminal railroad companies, shall be revised to provide for the reporting of serviceable and unserviceable home and foreign freight cars on line separated between per diem cars and non-per diem cars. Form OS-C shall be revised also to provide for reporting surplus per diem freight cars separated between home cars and foreign cars. The instructions to Form OS-C shall be revised to define unserviceable cars and surplus cars and per diem cars as follows:

(A) Unserviceable cars.

Unserviceable cars include cars out of service in connection with repair work. It includes cars being repaired in the shops of car builders, private car lines, and other noncarriers. (For the reporting railroads, it does not include cars which are being repaired in the shops of other railroads). It includes cars on repair tracks repaired and awaiting switching, cars on repair tracks undergoing or awaiting repairs, cars awaiting movement to repair tracks held on bad order storage tracks, cars awaiting movement to repair tracks held in train yard (excluding cars which are to be repaired in train yard without loss of time), cars moving empty in trains en route to shops, cars stored awaiting disposition (not including cars which have been retired from service and written out of ownership).

(B) Surplus per diem cars.

Surplus per diem cars are per diem cars which are in serviceable condition available for loading at the initial count on the last day of the quarter, but which have not been placed for loading within 48 hours. A record shall be made of all such cars on hand at 12:01 a.m. of the day following the last day of each quarter and a count of the same cars made 48 hours later to ascertain those still not placed for loading. The count of surplus cars shall include cars assembled in advance to meet loading requirements of more than 1 day, cars which have not been moved because of infrequent train service as on branch lines, cars set aside or stored for special or future loading such as perishables, grain, autos, rough freight, et cetera, cars stored because of seasonal decline in traffic, as coal cars, ore cars, et cetera. The count of surplus cars shall not include cars out of service in connection with repairs, cars actually moving en route to owners, cars moving on car service order cars in transit to loading points on holding road or to another road. The phrase "placed for loading" refers to: (1) physical switching of a car into position for loading (2) physical switching of a car into possession of a shipper who will subsequently move it to loading position; and (3) physical switching onto tracks at a freighthouse, pier, et cetera, for the purpose of being loaded.

(C) Per diem cars.

As used herein refers to freight cars other than cabooses owned or held under lease arrangement by U. S. class I line-haul railroads, whose interline rental is settled on a per diem basis under the code of per diem rules, or would be so settled if used by another railroad.

(7) Using ratios computed from information reported by class I line-haul and switching and terminal companies in Form OS-C, the average for the four quarters of the study year, the unserviceable per diem car days for the study year and surplus per diem car days for the study year shall be developed as follows:

(A) Unserviceable car days.

The ratio of home unserviceable cars on line to total home cars on line (serviceable plus unserviceable) shall be applied to the total home per diem car days computed in accordance with item 1 above to produce the unserviceable

car days of home cars for the study year. The ratio of foreign unserviceable per diem cars on line to total foreign per diem cars on line (serviceable plus unserviceable) shall be applied to the total foreign per diem car days on line developed in accordance with item 1 above to produce the total foreign per diem unserviceable car days for the study year.

(B) Surplus car days.

The ratio of home surplus per diem cars on line to home per diem cars on line (serviceable plus unserviceable) shall be applied to the total home per diem car days developed in accordance with item 1 above to produce the surplus car days of home per diem cars for the study year. The ratio of foreign surplus per diem cars on line to total foreign per diem cars on line (serviceable plus unserviceable) shall be applied to the total foreign per diem car days developed in accordance with item 1 above to produce the surplus car days of foreign per diem cars for the study year.

(8) Schedule 531, Statistics of Rail-line Operations, railroad annual report form A, shall be revised to require separate reporting of loaded and empty freight car miles of per diem cars in freight trains and passenger trains, and to include the definition of per diem cars given in item 7(C), above. Revisions herein prescribed to various reports shall take effect January 1, 1969.

Until current data is available to calculate the car-mile divisor, it shall be determined in the manner set forth in schedule 3, sheet 1, line 3, column 3, of Rail Form H. This requires the deduction from the annual report car-miles of all cars on class I railroads for the year under consideration of the estimated car-miles of non-per diem cars. The latter figure is estimated by applying to the annual car-miles of non-per diem cars on class I line-haul railroads in 1960, the ratio of car-miles of mileage cars in the year under consideration to the car-miles of mileage cars for the year 1960.

Until current data is available from the reports mentioned above, the car-day divisor shall be determined by the procedure set forth in Rail. Form H, schedule 2. The active per diem car days for the year under consideration developed at line 11, part B, thereof, shall be multiplied by the 1960 ratio of per diem days paid for to active foreign per diem car days and the product divided by the average number of per diem freight train cars in service in the year under consideration, developed at line 5, part A.

TABLE A

*Statistical and repair summary*

| Line No. | Item (1) | Source (2) | Total (3) | Mileage portion 50 percent of column (3) (4) | Time portion 50 percent of column (3) (5) |
|---|---|---|---|---|---|
| 1 | Freight-train car repairs[1] | Rail Form H, schedule 1, sheet 4, line 65, column (5)-- | ------ | ---------- | ---------- |
| 2 | Depreciation of freight-train car repair facilities | Rail Form H, schedule 1, sheet 3, line 57, column (5)-- | ------ | ---------- | ---------- |
| 3 | Property taxes on car repair facilities | Rail Form H, schedule 1, sheet 3, line 52, column (5)-- | ------ | ---------- | ---------- |
| 4 | Payroll taxes | Rail Form H, schedule 1, sheet 3, line 50, column (5)-- | ------ | ---------- | ---------- |
| 5 | Return on investment in freight-train car repair facilities | Rail Form H, schedule 1, sheet 4, line 62, column (5)-- | ------ | ---------- | ---------- |
| 6 | Return on working capital | Rail Form H, schedule 1, sheet 4, line 63, column (5)-- | ------ | ---------- | ---------- |
| 7 | Total ownership repair cost to be apportioned between miles and time | Lines 1 to 6 inclusive | ------ | ---------- | ---------- |

| Line No. | Item (1) | Source (2) | Total (3) | Home cars (4) | Foreign cars (5) |
|---|---|---|---|---|---|
| 8 | Total per diem freight-train cars in service, owned and leased from others December 31, 19__ (year preceding study year) | 19__ Annual Report Form A, schedule 417 | ------ | xxx | xxx |
| 9 | Total per diem freight-train cars in service, owned and leased from others December 31, 19__ (study year) | 19__ Annual Report Form A, schedule 417 | ------ | xxx | xxx |
| 10 | Average number of per diem freight-train cars in service, owned and leased from others (study year 19__) | Line 8 plus line 9 divided by 2.0 | ------ | xxx | xxx |
| 11 | Total per diem car days, study year 19__ | Line 10 x 365[2] | ------ | xxx | xxx |
| 12 | Serviceable per diem cars on line end of the quarters study year 19__ | Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__ | ------ | ---------- | ---------- |
| 13 | Unserviceable per diem cars on line end of the quarters study year 19__ | Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__ | ------ | ---------- | ---------- |
| 14 | Surplus per diem cars on line end of the quarters study year 19__ | Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__ | ------ | ---------- | ---------- |
| 15 | Total per diem cars on line end of the quarters study year 19__ | Line 12 plus line 13 | ------ | ---------- | ---------- |

See footnotes at end of table

*Statistical and repair summary*—Continued

| Line No. | Item (1) | Source (2) | Total (3) | Home cars (4) | Foreign cars (5) |
|---|---|---|---|---|---|
| 16 | Percentage distribution of per diem cars on line between home and foreign | Line 15 | 100.000% | % | % |
| 17 | Ratio of unserviceable per diem cars on line to total per diem cars on line | Line 13 divided by line 15 | xxx | | |
| 18 | Ratio of surplus per diem on line to total per diem cars on line | Line 14 divided by line 15 | xxx | | |
| 19 | Total per diem car days study year 19__ separated between home and foreign | Line 11, column (3) x line 16 | | | |
| 20 | Unserviceable per diem car days study year 19__ | Line 17, x line 19 | | * | |
| 21 | Surplus per diem car days study year 19__ | Line 18 x line 19 | | * | |
| 22 | Active per diem car days study year 19__ | Line 19 minus lines 20 and 21 | | | |
| 23 | Ratio total foreign per diem car days to total active foreign per diem car days | Line 19, column (5) divided by line 22, column (5) | xxx | xxx | |
| 24 | Total constructive per diem payable days study year 19__ | Line 22, column (3) x line 23, column (5) | | xxx | xxx |
| 25 | Total line-haul car-miles of per diem cars in the United States (loaded plus empty) | Annual report schedule 531 | | xxx | xxx |
| 26 | Constructive per diem payable days per car | Line 24, column (3) divided by line 10, column (3) | | xxx | xxx |
| 27 | Line-haul car-miles per car | Line 25, column (3) divided by line 10, column (3) | | xxx | xxx |
| 28 | Average repair cost per car | Line 7, column (4)(5) divided by line 10, column (3) | | [3] | [3] |

[1]Including allocation of inspection costs, nonrevenue freight, overheads, maintenance of shops, power plants, work equipment, miscellaneous equipment, and switching bad order cars.

[2]In leap years use 366.

*Cross add for total.

[3]Mileage and time portions of repair cost—50 percent each.

The rates hereinafter prescribed are based upon rail Form H calculations for the years 1963, 1964, and 1965, and the principles mentioned herein. Pending the availability of car-day and car-mile divisors developed currently as described above, these figures must be developed by use of Rail Form H and the ratios developed in the 1960 special studies. Shown below is a summary of the pertinent data.

TABLE A

*Composite of statistical and repair summary*

| Item | 1963 | 1964 | 1965 |
|---|---|---|---|
| Freight train car repairs | $550,322,495 | $564,752,370 | $562,290,338 |
| Depreciation facilities | 8,071,570 | 8,088,396 | 8,143,383 |
| Property taxes–facilities | 3,385,171 | 3,257,518 | 3,323,316 |
| Payroll taxes | 27,145,511 | 28,162,325 | 29,179,129 |
| Return on investment–repair facilities | 11,645,943 | 10,557,090 | 10,750,805 |
| Return on working capital | 2,665,587 | 2,730,841 | 2,946,229 |
| Total | 603,236,276 | 617,568,540 | 616,632,900 |
| Mileage portion | 301,618,138 | 308,784,270 | 308,316,450 |
| Time portion | 301,618,138 | 308,784,270 | 308,316,450 |
| Average number cars in service | 1,494,348 | 1,460,000 | 1,438,345 |
| Active per diem car days | 475,265,360 | 431,613,831 | 477,952,280 |
| Per diem payable days | 505,031,229 | 458,645,505 | 507,886,431 |
| Total line-haul car-miles | 24,290,196,857 | 22,217,341,219 | 22,981,573,444 |
| Per diem payable days per car | 337 | 346 | .352 |
| Line haul car-miles per car | 14,249 | 15,218 | 15,979 |
| Average repair cost per car (50 percent) | 201.83 | 211.49 | 213.66 |

| | Per diem payable days per car | Line-haul car miles per car | 50-percent average repair cost per car |
|---|---|---|---|
| 3-year average | 345 | 15,149 | $209.00 |
| Property tax ratio-1965 | 0.01018 | | |

TABLE B

*Summary of investment costs—per $1,000 original cost*

| Years in service | Annual charge to depreciation per $1,000 cost[1] | Composite interest on balance[2] | Reimbursement of property taxes[3] | Total columns 2, 3, 4 |
|---|---|---|---|---|
| Group A 0–5 | $30.00 | $55.50 | $9.42 | $94.92 |
| Group B 6–10 | 30.00 | 46.50 | 7.90 | 84.40 |
| Group C 11–15 | 30.00 | 37.50 | 6.38 | 73.88 |
| Group D 16–20 | 30.00 | 28.50 | 4.87 | 63.37 |
| Group E 21–25 | 30.00 | 19.50 | 3.35 | 52.85 |
| Group F 26–30 | 30.00 | 10.50 | 1.85 | 42.35 |
| Group G over 30 | xxx | 6.00 | 1.02 | 7.02 |

[1]At 3 percent per annum.

[2]At 6.0 percent per annum before taxes on midyear value of middle year of period based on original cost reduced 3 percent per annum.

[3]Taken at 1965 figure of 0.01018 multiplied by midyear value of car for middle year of period based on original cost reduced 3 percent per annum.

We find that the rates set forth in table C, below, are based on conservative estimates of cost, are just and reasonable and will provide just and reasonable compensation to car owners for the future, and that such rates shall be assessed and paid by all respondent carriers subject to the act from and after the effective date of our order herein.

RATE TABLE C

| Cost Bracket (1) | Mileage charges: Annual reduction in car value[1] (2) | Mileage charges: Annual repair and maintenance[2] (3) | Mileage charges: Total mileage cost[3] (4) | Mileage charges: Charge per line-haul mile[4] (5) | Time charges: Group A 0—5 years: Annual[5] (6) | Time charges: Group A 0—5 years: Daily[6] (7) | Time charges: Group B 6—10 years: Annual[5] (8) | Time charges: Group B 6—10 years: Daily[6] (9) |
|---|---|---|---|---|---|---|---|---|
| $0-1,000 | $12 | $209.00 | $221.00 | 1.47¢ | 291.92 | $0.85 | 281.40 | 0.82 |
| 1-3,000 | 24 | 209.00 | 236.00 | 1.57¢ | 374.84 | 1.09 | 353.80 | 1.03 |
| 3-5,000 | 48 | 209.00 | 257.00 | 1.71¢ | 540.68 | 1.57 | 498.60 | 1.45 |
| 5-7,000 | 72 | 209.00 | 281.00 | 1.87¢ | 706.52 | 2.05 | 643.40 | 1.86 |
| 7-9,000 | 96 | 209.00 | 305.00 | 2.03¢ | 872.36 | 2.53 | 788.20 | 2.28 |
| 9-11,000 | 120 | 209.00 | 329.00 | 2.19¢ | 1,038.20 | 3.01 | 933.00 | 2.70 |
| 11-13,000 | 144 | 209.00 | 353.00 | 2.35¢ | 1,204.04 | 3.49 | 1,077.80 | 3.12 |
| 13-15,000 | 168 | 209.00 | 377.00 | 2.51¢ | 1,369.88 | 3.97 | 1,222.60 | 3.54 |
| 15-17,000 | 192 | 209.00 | 401.00 | 2.67¢ | 1,535.72 | 4.45 | 1,367.40 | 3.96 |
| 17-19,000 | 216 | 209.00 | 425.00 | 2.83¢ | 1,701.56 | 4.93 | 1,512.20 | 4.38 |
| 19-21,000 | 240 | 209.00 | 449.00 | 2.99¢ | 1,867.40 | 5.41 | 1,657.00 | 4.80 |
| 21-23,000 | 264 | 209.00 | 473.00 | 3.15¢ | 2,033.24 | 5.89 | 1,801.80 | 5.22 |
| 23-25,000 | 288 | 209.00 | 497.00 | 3.31¢ | 2,199.04 | 6.37 | 1,946.60 | 5.64 |
| 25-27,000 | 312 | 209.00 | 521.00 | 3.47¢ | 2,364.92 | 6.85 | 2,091.40 | 6.06 |
| 27-29,000 | 336 | 209.00 | 545.00 | 3.63¢ | 2,530.76 | 7.34 | 2,236.20 | 6.48 |
| 29-31,000 | 360 | 209.00 | 569.00 | 3.80¢ | 2,696.60 | 7.82 | 2,381.00 | 6.90 |
| 31-33,000 | 384 | 209.00 | 593.00 | 3.95¢ | 2,862.44 | 8.30 | 2,525.80 | 7.32 |
| 33-35,000 | 408 | 209.00 | 617.00 | 4.11¢ | 3,028.28 | 8.78 | 2,670.60 | 7.74 |
| 35-37,000 | 432 | 209.00 | 641.00 | 4.27¢ | 3,194.12 | 9.26 | 2,815.40 | 8.16 |
| 37-39,000 | 456 | 209.00 | 665.00 | 4.43¢ | 3,359.96 | 9.74 | 2,960.20 | 8.58 |
| 39-41,000 | 480 | 209.00 | 689.00 | 4.60¢ | 3,525.80 | 10.22 | 3,105.00 | 9.00 |

ee footnotes at end of table

Time charges—*Continued*

| Line No. | Cost bracket | Group C 11-15 years | | Group D 16—20 years | | Group E 21—25 years | | Group F 26—30 years | | Group G over 30 years | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Annual[5] | Daily[6] | Annual[5] | Daily[6] | Annual[5] | Daily[6] | Annual[5] | Daily[6] | Annual[5] | Daily[6] |
| | | (10) | (11) | (12) | (13) | (14) | (15) | (16) | (17) | (18) | (19) |
| 1 | $0-1,000 | 270.88 | 0.79 | 260.37 | 0.75 | 249.85 | 0.72 | 239.35 | 0.69 | 216.02 | 0.63 |
| 2 | 1-3,000 | 332.76 | 0.96 | 311.74 | 0.90 | 290.70 | 0.84 | 269.70 | 0.78 | 223.04 | 0.65 |
| 3 | 3-5,000 | 456.52 | 1.32 | 414.48 | 1.20 | 372.40 | 1.08 | 330.40 | 0.96 | 237.08 | 0.69 |
| 4 | 5-7,000 | 580.28 | 1.68 | 517.22 | 1.50 | 454.10 | 1.32 | 391.10 | 1.13 | 251.12 | 0.73 |
| 5 | 7-9,000 | 704.04 | 2.04 | 619.96 | 1.80 | 535.80 | 1.55 | 451.80 | 1.31 | 265.16 | 0.77 |
| 6 | 9-11,000 | 827.80 | 2.40 | 722.70 | 2.09 | 617.50 | 1.79 | 512.50 | 1.49 | 279.20 | 0.81 |
| 7 | 11-13,000 | 951.56 | 2.76 | 825.44 | 2.39 | 699.20 | 2.03 | 573.20 | 1.66 | 293.24 | 0.85 |
| 8 | 13-15,000 | 1,075.32 | 3.12 | 928.18 | 2.69 | 780.90 | 2.26 | 633.90 | 1.84 | 307.28 | 0.89 |
| 9 | 15-17,000 | 1,199.08 | 3.48 | 1,030.92 | 2.99 | 862.60 | 2.50 | 694.60 | 2.01 | 321.32 | 0.93 |
| 10 | 17-19,000 | 1,322.84 | 3.83 | 1,133.66 | 3.29 | 944.30 | 2.74 | 755.30 | 2.19 | 335.36 | 0.97 |
| 11 | 19-21,000 | 1,446.60 | 4.19 | 1,236.40 | 3.58 | 1,026.00 | 2.97 | 816.00 | 2.37 | 349.40 | 1.01 |
| 12 | 21-23,000 | 1,570.36 | 4.55 | 1,339.14 | 3.88 | 1,107.70 | 3.21 | 876.70 | 2.54 | 363.44 | 1.05 |
| 13 | 23-25,000 | 1,694.12 | 4.91 | 1,441.88 | 4.18 | 1,189.40 | 3.45 | 937.40 | 2.72 | 377.48 | 1.09 |
| 14 | 25-27,000 | 1,817.88 | 5.27 | 1,544.62 | 4.48 | 1,271.10 | 3.68 | 998.10 | 2.89 | 391.52 | 1.13 |
| 15 | 27-29,000 | 1,941.64 | 5.63 | 1,647.36 | 4.77 | 1,352.80 | 3.92 | 1,058.80 | 3.07 | 405.56 | 1.17 |
| 16 | 29-31,000 | 2,065.40 | 5.99 | 1,750.10 | 5.07 | 1,434.50 | 4.16 | 1,119.50 | 3.24 | 419.60 | 1.22 |
| 17 | 31-33,000 | 2,189.16 | 6.35 | 1,852.84 | 5.37 | 1,516.20 | 4.39 | 1,180.20 | 3.42 | 433.64 | 1.26 |
| 18 | 33-35,000 | 2,312.92 | 6.70 | 1,955.58 | 5.67 | 1,597.90 | 4.63 | 1,240.90 | 3.60 | 447.68 | 1.30 |
| 19 | 35-37,000 | 2,436.68 | 7.06 | 2,058.32 | 5.97 | 1,679.60 | 4.87 | 1,301.60 | 3.77 | 461.72 | 1.34 |
| 20 | 37-39,000 | 2,560.44 | 7.42 | 2,161.06 | 6.26 | 1,761.30 | 5.11 | 1,362.30 | 3.95 | 475.76 | 1.38 |
| 21 | 39-41,000 | 2,684.20 | 7.78 | 2,263.80 | 6.56 | 1,843.00 | 5.34 | 1,423.00 | 4.12 | 489.80 | 1.42 |

[1]Forty percent of annual reduction in value (depreciation).

[2]Statistical summary—line 28, column 4.—3-year average—see table A.

[3]Column 2 + column 3.

[4]Column 4 divided by car-mile divisor—statistical summary, line 27, column 3.—3-year average (15,000) see table A.

[5]Tax and investment costs for group and cost bracket (table B, column 5) less column 2 plus time portion of 3-year average repair and maintenance cost (statistical summary, line 28, column 5)—see table A.

[6]Annual time cost divided by car day divisor (statistical summary, line 26, column 3)—3-year average (345d) see table A.

DOCKET NO. 31358

In docket No. 31358, the complainants seek a finding by the Commission that the AAR per diem rates charged since March 1951 were just, reasonable, and otherwise lawful, and that payments at lesser rates have been, are, and would be unjust, unreasonable, and noncompensatory, in violation of section 1 of the Interstate Commerce Act. As a result of subsequent amendments to the complaint in this case, it now embraces all past rates, including the multilevel rates. The circumstances involved in this dispute were fully described in the prior report of the Commission. *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co., supra.* In that report, decided October 17, 1955, it was found that the rates charged up to that time were not in excess of reasonable compensation during the periods in which they were effective, and that the then existing rate of $2.40 was not in excess of reasonable compensation for present use. Upon appeal by the defendants, a three-judge United States District Court set aside the order of the Commission discontinuing the proceeding and remanded it for further consideration. *Boston & Maine Railroad* v. *United States, supra.* An appeal to the United States Supreme Court was dismissed. *Boston & Maine Railroad* v. *United States, supra.*

As heretofore described, a number of the complainants commenced civil actions before the United States District Court for the Southern District of New York, seeking judgments for damages against the defendants for the balance of per diem payments alleged to be due and unpaid. The court in those cases found generally for the complainants, but deferred decision as to the amount of damages pending the final determination of the issues in docket No. 31358. Pursuant to the order of the court, certain of the parties to the civil suits sought and obtained permission to intervene in docket No. 31358, and appropriate amendments to the complaint in that proceeding were made, requesting the Commission, without regard to the proceeding pending in docket No. 33145, to advise the court what per diem rate was just, fair, reasonable and nondiscriminatory for each month beginning with August 1953, to the date of the order of the court, i.e., June 15, 1962. A certified copy of the order was required to be filed with the Commission, which specifically requested its cooperation and advice as described above. *Baltimore & O. R. Co.* v. *New York, N. H. & H. R. Co., supra.* Similar advices are desired by the Supreme Court of the

State of New York, County of New York, in connection with the disposition of suits brought by the Boston & Maine and New Haven Railroad against the Illinois Central Railroad to recover interline freight balances, in which the defendant counterclaimed for balances under per diem claims.

In giving further consideration to the issues in docket No. 31358, certain questions raised on remand require attention. In 1951, the AAR subcommittee on mileage and per diem recommended that account No. 314, the major repair account, be subdivided to record separately the repair costs for home cars, foreign cars, railroad and privately owned mileage cars, and cabooses; that classified repairs, running repairs, switching expenses and credits for sales of scrap be shown separately; and that car repairs for cabooses be eliminated from account No. 314 and caboose-car days eliminated from the freight-car day divisor. In remanding the case, the court expressed the view that the Commission should not have rejected the recommendation without a more thorough investigation and analysis.

Concededly, the multitudinous cost items entered in account No. 314 over the years, without separation as to the sundry elements mentioned by the committee, are not now susceptible of separation. Sample studies conducted by the Section of Cost Finding in 1960 dealt with several separations, however, and the analysis based thereon took into consideration such of these factors as were considered significant. The recorded totals of the past accounts can be separated, therefore, by use of the ratios derived from the 1960 studies. The findings which follow include this procedure.

The court also expressed doubt as to the validity of car-day divisors which were based upon average utilizations for the past 20 years, the period having been chosen with reference to the average age of cars then in service. There can be little dispute that where the object of the computation is to ascertain the cost per active car day for any given period, not only must the costs incurred in that period be employed, but also the active car days for that same period. Since our consideration in docket No. 31358 is of past years, we have no need to attempt an approximation of utilization to be anticipated in the future and may employ, to the extent permitted by available statistics, the car days for the years in issue.

Remand of docket No. 31358 by the United States District Court was due to the conclusion of the court that consideration should have been given to car mileage and the fair distribution of per diem

costs among car users. We have found that the substantial difference in use of cars measured by line-haul mileage requires that it be reflected in the distribution of per diem costs in the future. No records are available, however, with which to determine the actual mileages of foreign per diem cars during the past periods when the challenged rates were in effect.

A method of estimating an appropriate rate for past years which took into account a charge based on mileage was suggested by the Section of Cost Finding and a generally similar method was used by the examiner to calculate rates which he found reasonable for past years. Both methods require certain assumptions which are not sufficiently supported by the record. After assigning the total annual costs for the year 1960 between time and mileage, each estimates the per-mile and per-day cost. For each carrier the per-mile cost is multiplied by its 1960 line-haul mileage of foreign cars and divided by its per diem days paid for to produce a daily figure which, when added to an individually adjusted per-day cost, constitutes the rate estimated as proper to be paid by that carrier. Necessarily, a different rate is produced for each carrier.

To estimate a similar rate for each carrier for years other than 1960, the examiner determined the ratio which the 1960 rate bore to the 1960 average rate calculated on a time-only basis, and applied this to the average, time-only rates which he found to be reasonable for each of the past periods during which the AAR rates were in effect. The Section of Cost Finding method employed the ratio which the individual carriers' time-mile rate in 1960 bore to the overall time-mile rate of all carriers in that year, applying it to a separately estimated overall time-mile rate for the year under consideration. There is some evidence that the ratio of per diem days paid for by individual railroads in 1960 to the total of all carriers is substantially similar to the ratio in other years in issue, but a similar relationship has not been proven with respect to the mileage of foreign cars on individual lines. While many of the ratios developed in the 1960 studies, particularly those in schedule I of Rail Form H underlying the estimation of ownership repair costs, would not change appreciably from year to year, this is not true with respect to the ratios necessarily employed in estimating these time-mileage rates for individual carriers. It cannot be found that 1960 was so nearly representative of conditions prevailing throughout all the other years in issue with respect to car mileage on a carrier-by-

carrier basis as to justify reliance on these ratios in making determinations upon which monetary judgments depend.

We find that no practicable and probative method has been demonstrated on this record by which a reliable estimate might be made as to the distribution of costs between time and mileage for individual defendants in past years, or for all railroads for years other than 1960. The reasonableness of rates assessed in past years must be measured by their application on a daily basis.

As a result of the complaint filed on September 21, 1953, the decision by the commission in the title proceeding on October 19, 1955, and our decision in *Alabama T. & N. R. Co. v. Aberdeen & R. R. Co.*, *supra*, the use of reproduction cost as the base for calculation of charges to depreciation and interest was approved. In neither of those cases did the record contain the extensive special studies and data now available for our consideration. In 1949 and in 1955, the daily rate based upon the average depreciation and interest cost of all cars was clearly insufficient to cover the particular costs of many of the new cars then being built. The greater desirability of the new cars apparently resulted in greater use being made of them by foreign lines, either pursuant to or in violation of car service rules. As to these particular cars, owners did not receive just and reasonable compensation under rates fixed by the average costs of all cars. At the same time, to the extent that the older cars were used, the amounts received by owners exceeded the necessary compensation.

Calculation of rates using reproduction cost as a base represented an attempt to compensate for this situation. The extent to which the respondents actually suffered a net deficiency in compensation as a result of undercompensation on new cars not by overcompensation on old cars has not been established.[26] Where a single average daily rate is employed, it cannot be judged with reference to the cost of particular cars. It must be measured with reference to the total costs of all cars. The increase in the per diem rates due to use of reproduction cost resulted in only a few of the new cars receiving per diem payments which met their particular costs. Thus, of the 974,386 cars sampled in 1961, there were 643,123, or about two-thirds, which had depreciated original cost of less than $3,000; 331,263

[26] On December 31, 1961, a compilation of 974,386 car items out of a total of about 1,000,000 cars indicated that about two-thirds had depreciated original costs lower than the fleet average actual book original cost, a comparison at the average rate.

had depreciated original costs over $3,000. With rates based upon original cost, about one-third of the per diem fleet would consist of cars which would not receive payments equivalent to their costs. Two-thirds would receive payments in excess of their costs. Use of reproduction cost increased the average depreciated cost to $4,200 which still left over 20 percent of the fleet undercompensated. At the same time, the latter method increased the depreciation and interest charged to the fleet as a whole by approximately $330,500,000, equivalent to over 60 cents per day on each car.

Consideration has already been given to the use of reproduction cost as a base for calculation of per diem rates and to the extent to which fairness to owners requires recognition of decreases in the purchasing power of the dollar. As heretofore pointed out, the use of a charge to depreciation based upon reproduction cost of the car provides a measure of the owner's capital cost burden only if it has paid the full purchase price itself. In fact, a substantial portion of the cost of cars is customarily obtained from lenders, and repaid over subsequent years in dollars of current purchasing power. It is proper to allow for inflation with respect to that portion of the average original cost of the cars representing the actual investment of the owner. For reasons heretofore mentioned, it is found that such allowance applied to 40 percent of the annual depreciation charge on the average original cost makes adequate provision for compensation to owners for this element of the ownership burden. No persuasive reason is shown why the invested amount upon which interest is calculated should be inflated by a cost index representing the approximate current cost of building the car. Comments with respect to this point made earlier in this report are equally applicable to the calculation for rates in prior years.

Upon further consideration we find that the use of average reproduction cost of all cars has not been shown to be just and reasonable or predictive of just and reasonable compensation to car owners. We are persuaded, however, that under a single average rate, car owners do incur some loss of just compensation due to greater than average use being made of newer cars, and in the rates hereinafter found to be just and reasonable we have included provision therefor.

None of the AAR calculations is based upon data for the years in which the rate actually was applied. Thus the $2.40 rate which was in effect from August 1, 1953 to January 1, 1957, was

based upon statistics for the calendar year 1952. These indicated a cost for repairs and associated maintenance items of 121.05 cents per active car day; taxes of 14.334 cents; return on depreciated investment in freight cars and repair facilities, based on an average of original and reproduction costs, of 47.128 cents; and allowance for depreciation, based upon reproduction cost, of 56.222 cents. The allowances for depreciation and interest on cars and facilities increased these figures approximately $200 million over original cost figures. About 1 1/3 cents per day were added to allow for 1953 increased wage and material costs.

The $2.75 rate, which was in effect from January 1, 1957, to December 1, 1959, was supported by AAR staff calculations using cost statistics for the 12 months ending June 30, 1956. These indicated a cost for repairs and associated maintenance items of 114.28 cents per active car day; taxes of 18.137 cents; return on depreciated investment in freight cars and repair facilities, based upon reproduction costs, of 72.06 cents; allowance for depreciation of freight cars, based upon reproduction costs, of 61.48 cents; and allowance for depreciation of repair facilities, based on original cost, of 1.58 cents. The mid-1955 to mid-1956 cost as thus computed, 267.54 cents per active car day, was increased by 9.41 cents to allow for labor, material and tax increases, resulting in a total of 276.96 cents, which was rounded to the $2.75 rate.

The reproduction value of cars used by the AAR to calculate the allowance for depreciation was based on reproduction costs as of December 31, 1955, using, however, the higher inventory of cars as of December 31, 1954, since that was the latest then available. The amount was also increased by 8.5 percent to reflect estimated cost increases between 1955 and the date of the AAR calculations. Cars owned or leased, including cabooses, at the end of 1954 were 1,757,731, compared to 1,719,951 at the end of 1955. The cost index increased from 450 in 1954 to 468 in 1955. Use of the higher costs as well as the higher number of cars produced an overstatement of the allowance for depreciation.

The $2.88 rate, which was in effect from December 1, 1959, to January 1, 1964, was supported by AAR staff calculations using cost statistics, other than for repairs, for the calendar year 1958. A 5-year adjusted average cost of repairs was employed, which, together with associated maintenance items, amounted to 105.35 cents per active car day. Allowance for taxes was 18.076 cents; return on depreciated investment in

freight cars and repair facilities, based on reproduction costs, was 85.737 cents; allowance for depreciation of freight cars based on reproduction cost was 73.276 cents; and allowance for depreciation of repair facilities, based on original cost, was 1.451 cents. The total cost, as thus computed, 283.893 cents per active car day was adjusted to reflect 1959 cost increases, resulting in a figure of 287.94 cents which was rounded to the $2.88 rate.

The rates for the several brackets under the new multilevel system which became effective January 1, 1964, are supported by an AAR study using 1961 costs which separated the ownership burden into two charges, one for depreciation and interest on car value, and one covering total operating costs including taxes. After classifying cars into value brackets according to their depreciated original cost, the amount to be allowed cars in each bracket for depreciation was calculated by allowing 3 percent on the average undepreciated reproduction value of that group of cars. The amount allowed as interest was calculated by taking 6 percent of the average depreciated reproduction value of all cars in the group. All other costs were taken as the same for every car, and were calculated at $406 per car. In calculating the cost of taxes, and the repair and associated maintenance costs, which produced the figure of $406, the AAR employed the same procedures used in computing these items in prior years. Ratios and apportionments used were those developed by the 1956 questionnaire, heretofore mentioned. Account No. 314 repair costs to be anticipated were estimated by using the average of such costs for the 5-year period, 1957-1961, and a car utilization factor of 91.87, or 335.33 days, was assumed, based upon the average of the 20-year period, 1942 through 1961.

Both the Section of Cost Finding calculations and those made by the AAR in support of the rates prior to 1964 purport to calculate the ownership cost of freight cars at an average figure spread over all per diem cars for days of active use. Substantial variations occur, however, due to differences in the apportionments, methods used, and the basic data employed. To calculate the base for depreciation, the AAR multiplied the number of cars in per diem use, both owned and leased, by the average undepreciated reproduction cost, the latter figure having been obtained from the Commission's Bureau of Accounts, Section of Valuation and Depreciation. A rate of slightly over 3 percent was then applied to the total valuation to calculate the charge. The Section

of Cost Finding calculations employ the Annual Report data fo charges to depreciation plus an allowance for assumed depreciatio on fully depreciated cars. These are based upon original costs In place of using a depreciation charge for cars leased fro nonrailroad owners, the Section of Cost Finding method include the payments made to such owners as shown in the annual reports with minor adjustments. Where a single average rate is bein calculated for all cars, the method used by the Section of Co Finding appears the more accurate.

Prior to the calculations underlying the $2.88 rate, account No 314 repair costs had been estimated by the AAR using the costs o the latest available year. Beginning with that rate, and again i calculations underlying the multilevel rates, the average o account No. 314 costs for the last 5 years, adjusted to curre levels, was employed. The record demonstrates that account No 314 is subject to annual fluctuation of as much as 20 percent. Th 1954-58 adjusted account No. 314 average as computed by the AA and employed in calculations underlying the $2.88 rate whic became effective December 1, 1959, was $590,045,295. Th actual amount subsequently developed by the AAR for 1959 wa $516,023,831, and for 1960, the first full year in which the rat applied, the actual amount was $488,898,352. In 1961 the figur dropped to $438,620,793.

The AAR estimated the deadhead haul cost of repair materia referred to by the Section of Cost Finding as nonrevenue freight by taking 6.06 percent of the total of the material proportion of th freight car repair proportion of general expense, maintenance o shop and equipment accounts, and the material portion assigne from account No. 314. The percentage was based upon a stud made in connection with *Rules for Car-Hire Settlement*, supra while apportionment of the various accounts was based on studie made in 1956.[27] The Section of Cost Finding analyzed the 196 Annual Report accounts to isolate expenses applicable to non revenue freight. From the special studies, ratios were develope to estimate the ton-miles of nonrevenue freight applicable to equip ment repairs, and the consequent cost. Further analysis of repai accounts in the Annual Reports developed the separation of thi amount between ownership costs of per diem cars, and othe costs.

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[27] The case cited was decided January 1, 1930 and the study was between 2 and 30 years old during the period it was used by the AAR for the calculatio of rates here in issue.

Adjustments used by the AAR to account No. 314 were based upon the returns to a questionnaire of August 14, 1956, covering operations for the 12 months ending June 30, 1956. One of these adjustments involved a reduction of from 64 to 66 percent of the total labor cost of train yard and interchange inspection, to eliminate costs resulting from inspection of private cars, foreign per diem cars, and that related to transportation activities. A further deduction of 1.46 percent of the total of account No. 314 was made to reflect payments for foreign cars destroyed, less salvage. Labor and material charges for user responsibility repairs to foreign cars were deducted by use of an amount calculated at 2.73 percent of the total account No. 314.

The Section of Cost Finding analysis included as ownership costs the inspection costs of foreign cars, and deducted the cost of repairs to home cars which were user responsibility. In the calculations underlying the $2.40 rate the AAR employed 40 percent of inspection costs as the portion applicable to private cars, user costs and transportation activities. This was based upon the results of the 1947 studies. The Section of Cost Finding studies in 1960 indicated that 45 percent should be so assigned.

Deductions made by the AAR from account No. 314 included 2.73 percent of the total, based upon the 1956 studies, representing the labor and material charges and voucher payments for repairs to foreign cars made necessary by unfair usage by the handling line. This deduction does not include any amount for handling line responsibility repairs by car owners, made on their own cars when acting as user thereof. Thus, while the per diem rate eliminated the cost of repairs due to unfair usage by users of foreign cars, it did not eliminate the cost of repairs due to unfair usage by the owner when using its own car. The cost of unfair usage repairs should be borne by the using line directly, whether the car is home or foreign. The 1960 studies indicated that 2.788 percent of account No. 314 total repair costs arose from this source.

While the Section of Cost Finding analysis covers about 21.2 percent less cars than those included by the AAR, generally the total amounts for repairs and associated items are higher. A major cause of the difference is in the allowance for switching of bad order cars. The AAR added to account No. 314 an amount equal to 1.24 percent thereof, based upon its 1956 study, to approximate the additional charges for this item which were recorded in other accounts. The Section of Cost Finding analysis for 1960

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added the equivalent of 14.7 percent of account No. 314 for this item. The remainder of the excess of these calculations arises from larger allowances for items of general expenses, transportation expenses, maintenance of way expenses, and overheads on the latter two. The content and method of evaluation of the questionnaires relied upon by the AAR are not of record. In view of the continuing changes in composition of the per diem fleet, traffic movement and volume, operating practices, et cetera, it must be found that the results produced by the 1960 studies are the most reliable and take precedence over inconsistent estimates developed through use of the older studies.

To develop car-day divisors, the AAR totaled the freight cars owned or leased at the end of each year for the preceding 20 years, and subtracted therefrom the total average number of home bad order and surplus cars for the same years. The ratio of the resulting figure to the total number of cars was then multiplied by 365 to determine the active car days per car. The figures included cabooses and other cars not used in per diem service but, to an indeterminate extent, any inaccuracy resulting therefrom was offset by the inclusion of the costs attributable to the additional cars.

The deduction as computed by the AAR for home cars out of service due to repairs exceeds that indicated by the special studies. Members of the AAR report on form CS-60 the home per diem cars out of service for this cause. A test in September 1956, indicated that these reports were understated by 23.4 percent. In subsequent per diem cost calculations the reported totals were increased by this percentage. For the year 1960, the reported number of 132,597, thus increased, and multiplied by 366 days, produces 59,886,640 bad order car days. The special studies indicated 54,198,734, a difference of about 10 percent.

The deduction for surplus cars used by the AAR appears greatly underestimated. Members of the AAR regularly report to that organization, on form CS-44, the number of surplus cars on hand, both home and foreign. A 1-week test in February 1949, indicated that approximately 1.6 percent were foreign cars and thereafter the amount to be deducted for surplus cars was reduced by this percentage. As reported, the daily average figure for home and foreign surplus cars for 1960 was 36,672. Reduced by the factor above mentioned to eliminate foreign cars, and multiplied by 366 days, produces a figure of 13,421,952 surplus car days, less than 20 percent of the number indicated by the Section of Cost Finding studies.

The Section of Cost Finding studies were based upon actual counts of cars on hand and not placed for loading at the beginning and end of a 48-hour period. The reports on CS-44 are based upon the judgment of each carrier's personnel. The latter require that each carrier estimate, at the end of each day, the empty cars on hand at loading stations in excess of the number needed for the next day's loading. It is a figure which the AAR witness conceded was not very accurate, and was generally understated, particularly in periods of car shortage.

The validity of the AAR cost calculations, and the questionnaire data employed, were challenged on a number of grounds. In his report the examiner made a number of revisions of the AAR calculations to conform to the principles which he found applicable. On exceptions, the revisions to the AAR calculations are challenged in several respects while other parties criticize the absence of revisions which they espouse. Upon consideration of the entire record, we conclude that the past AAR calculations are based upon statistics and apportionments of such limited probative value as to render them unsatisfactory as a measure of past per diem costs. We find that the complainants in docket No. 31358 have failed to sustain their burden of proving that the rates in issue are just, reasonable, and nondiscriminatory for use in the determination of per diem charges with respect to the defendants.

The complaints, as amended, seek specific findings for each and every month, at least through June, 1962. The record does not contain, nor, so far as appears, does the data exist, in such form as to make possible separate calculations as to ownership costs on a monthly basis. Maintenance of records on an annual basis precludes any attempt to analyze the costs with relation to shorter periods, although findings obviously may be applied on a monthly basis. Summary T-1 of Rail Form H provides a method of deriving a single average daily per diem cost applicable to all cars for years other than 1960, making use of the ratios and apportionments developed through the 1960 studies.

We have found that car owners will receive a fair return on the value of their investment in freight cars under a multilevel system by allowance of interest at 9 percent before taxes on 40 percent of original cost and 4 percent before taxes on 60 percent of original cost. Under that system, the allowance for depreciation of each car is related closely to its actual annual loss in value. When a single average rate is applied to all cars, having appreciably different original costs, compensation to

individual owners, or for particular cars, may not be as complete. This is an inevitable consequence of averaging. Insofar as rates for the past are concerned, the record permits only the latter method and our findings, made pursuant to the requests of the United States District Court and the Supreme Court of the State of New York, are on this basis.

As noted above, we are satisfied that strict adherence to the interest rates just mentioned will not compensate owners for the consequences of excess use of higher cost cars when a single average rate is used, but that application of the account No. 53 index of freight car costs to the depreciation and interest base is improper. Summary T-1 of Rail Form H, however, includes an allowance for interest before taxes which results in an after tax return of 4 percent on the total original cost. The net effect is to allow car owners interest on the 40 percent investment in excess of 10 percent before taxes, while retaining a return of 3.849 percent before taxes to meet average interest costs of borrowed funds. This cost analysis also allows car owners substantial sums as depreciation charges on cars which had been fully depreciated under accelerated schedules pursuant to the defense amortization program prior to the period covered by the present dispute. We find that determination of just, reasonable, and nondiscriminatory rates for the past for the settlement of per diem balances between the plaintiffs and the defendants in docket No. 31358, can most effectively be accomplished by application of the cost analysis designated as Summary T-1 of Rail Form H, using the ratios and apportionments developed by the 1960 special studies. The summary calculations from Rail Form H, using the methods herein approved, for each year from 1953 through 1965, inclusive, are shown in the appendix to this report.

The defendants in docket No. 31358 contend that we should calculate and deduct from the per diem charges for the past years amounts which represent ownership repairs made by them and not reimbursed pursuant to AAR rules. We have heretofore expressed our view that the calculation of ownership costs and consequent per diem rates must include all costs properly attributable to the repair and maintenance of the cars. As amended, the complaint seeks specific findings as to the just and reasonable rates, which findings may be considered by the United States District Court and the New York Supreme Court in assessing damages. The per diem rate which is fair and reasonable must be measured by an equitable distribution of total ownership burden. It exists

independently of alleged offsets and must be found without reference to them.

Upon consideration of the record herein, we find that the just, fair, reasonable, and nondiscriminatory rates, proper as daily charges for the settlement of per diem balances by and between the parties to pending suits herein before described for the use of foreign per diem freight cars in and during each and every month from August 1953 through December 1965, inclusive are as shown below. The fluctuations in rates from year to year result from changes in economic activity and consequently the extent to which cars are utilized.

| Year | Rate Per Day |
|---|---|
| 1953 | $2.12 |
| 1954 | 2.37 |
| 1955 | 1.92 |
| 1956 | 1.96 |
| 1957 | 2.12 |
| 1958 | 2.60 |
| 1959 | 2.44 |
| 1960 | 2.50 |
| 1961 | 2.58 |
| 1962 | 2.76 |
| 1963 | 2.50 |
| 1964 | 2.69 |
| 1965 | 2.85 |

Our conclusions with respect to the present multilevel rates bar any attempt to furnish advice as to just and reasonable rates for the past on a multilevel basis. Available information limits our findings to the single, average rates shown above. Just and reasonable rates for years subsequent to 1965 may be calculated in the same manner as heretofore set forth.

Insofar as the rates approved here for the future are concerned, the respondents will be expected to give them a fair opportunity, through practical application. Proceedings such as those here presented are primarily in the nature of contractural disputes solely between carriers where settlements should be encouraged. After giving such rates a fair opportunity, the respondents will be expected to attempt first to reconcile any differences and reach

some agreement before calling upon the Commission to mod
the rates prescribed, particularly since the underlying facts a
within the carriers' own knowledge and control.

There is a clear distinction between the provisions of secti
1(14)(a) herein applied and the recently confirmed statute
authority embodied in the new provisions enacted by the Congres
The former provisions, as interpreted by the courts, limit o
powers to determining compensation (basic per diem) bas
strictly upon cost considerations. On the other hand, the latt
provisions that empower us to set so-called incentive rate
which are obviously something above and beyond the regular
basic compensation, permit us to consider and give effect
factors other than costs, such as the need for encouraging t
construction of new cars and for the general replenishing of t
car fleet. While the incentive provisions are not involved in t
instant proceedings and cannot be considered on this record,
other proceedings currently pending at various stages of admi
istrative process, the Commission is moving toward determina
tion of whether or not incentive rates should be established a
the attendant question of modification of our present car servic
rules.

## Summary of Findings and Conclusions

To recapitulate our findings and conclusions with respect t
the principal matters in issue, upon consideration of the entir
record herein, we find:

1. That in docket No. 31358 the per diem rates charged pursuan
to the agreement, *Section 19, Application No. 7, Modified
American Railroads, Per Diem, Mileage, Demurrage and Storage
Interchange*, approved August 28, 1950, from and after August 1
1953, have not been shown to be just, fair, reasonable and non
discriminatory;

2. That in docket No. 31358, the just, fair, reasonable, an
nondiscriminatory rates, prices, or daily charges for the settle
ment of per diem balances by and between the parties to pendin
suits hereinbefore described for the use of foreign per diem
freight cars in and during each and every month from August
1953 through December, 1965, are those set forth above, an
that the just, fair, reasonable, and nondiscriminatory rates fo
these purposes for the period subsequent to January 1, 1966
until the effective date of the rates herein prescribed shall be
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ascertained by the methods employed herein to calculate the rates found reasonably for the prior years;

3. That the performance of orderly and efficient transportation service by rail in the future requires the uniform observance of per diem charges by all railroads and the prescription of such uniform charges by this Commission pursuant to the authority contained in section 1(14)(a) of the Interstate Commerce Act;

4. That reasonable compensation to owners of freight cars in per diem service requires an appropriate allowance for the impact of inflation upon the funds invested in them, and that allowance of 40 percent of the original cost of freight cars as that portion fairly representative of the average owner's investment, and the allowance of a return of 9 percent interest before income tax upon such amount provides reasonable compensation therefor and includes a fair return upon the value of their investment;

5. That reasonable compensation to owners of freight cars in per diem service requires the calculation of ownership costs as provided hereinbefore, including prescription of a method of allocating and computing costs of repair and maintenance, taxes, and capital investment;

6. That reasonable compensation to car owners requires that the ownership costs be distributed among and borne equitably by all railroads making use of such cars in and proportion to the amount of use, that the use made of cars must be measured by both the length of time cars are held and the amount of activity for which they are subjected, and that the most practicable and reliable method of measuring car activity is the time-load mileage over which they are moved;

7. That the cost of repair and maintenance of freight cars should be distributed between time and mileage, one-half to each, and that the retirement value of cars resulting from their employment in transportation service should be spread over a period of 30 years, allowing 5 percent of the original cost per boat therefor, and distributing the annual amount 50 percent to mileage and 50 percent to time, as the equal factors thereof;

8. That reasonable compensation to car owners requires that ownership costs be closely related to the original cost of cars and that rates productive of such compensation vary with original cost by factors proportionate to such cost;

9. That adjustments in the calculated costs of car ownership to reflect alleged deficiencies in the methods of accounting used by railroads to determine such costs for equity purposes in case of each other would not result in reasonable compensation to car owners; and

It, that reasonable compensation to car owners requires the payment by all railroads of the time and mileage rates set forth in table C, supra, from and after the effective date of the order in docket No. 33143.

Commissioner Walrath, being necessarily absent, did not participate.

It is ordered, That the proceeding in docket No. 33138 be, and it is hereby, discontinued.

It is further ordered, That the complaint in docket No. 33104, except to the extent to which the relief sought has been granted by order in docket No. 33143, be, and it is hereby, dismissed.

It is further ordered, That on and after October 1, 1963 the respondents in docket No. 33143 be, and they are hereby, required to maintain accurate records of both the days on-line of foreign per diem freight-train cars and the line-haul mileage over which they move each such car, and to pay to the owners of said cars the charges per day and per mile set forth in rate table 1 in this report; that this order shall continue in full force and effect until the further order of the Commission, and that the charges herein prescribed shall be paid for each day foreign cars are held; but nothing in this report and order shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

It is further ordered, That the order of the Commission dated October 3, 1963, which required respondents in docket No. 33143 to preserve all records, data and information underlying the reports filed by them in connection with said proceeding until further order, be, and it is hereby, canceled.

By the Commission.

## APPENDIX

To facilitate the investigation in Docket No. 33145, the Commission incorporated in the order of investigation an order under section 20 of the act, requiring the filing of special reports by the carriers. The tentative form of these reports and the nature of the studies to be accomplished in preparing them were thereafter established as a result of conferences between attorneys and accountants for interested parties, a representative of the Association of American Railroads (AAR), and staff members of the Cost Finding Section, Bureau of Accounts, of the Commission. After a formal prehearing conference, at which copies of the proposed forms were distributed, all parties were afforded an opportunity to file verified statements for or against them, and thereafter to file rebuttal statements. After study of these statements and consideration of the contentions of the parties, the final form of the reports was determined by the Cost Section staff and served on all railroads. Only the class I line-haul roads were required to complete all of the forms. Other roads, including short lines, switching and terminal companies and electric railways, were required to complete only forms I, R-1A, and 10. The nature of the special studies which were made is indicated by the list of reporting forms, as follows:

Form A — Preliminary Survey of Equipment Repair Facilities.
1 — Special Study of Freight-train Car-miles and Car-days.
R-1A — Report of Per Diem Days and Payments.
2 — Special Study of Amounts Charged to Account 314 for Direct Wages Applicable to Freight-train Car Repairs.
3 — Special Study of Amounts Charged to Account 314 for Direct Materials Applicable to Freight-train Car Repairs.
4 — Summary of Special Study of Work of Freight-train Car Inspectors.
5 — Separation of Account 314 - Freight-train Cars - Repairs.
6 — Separation of Number of Cars, Original Cost, Equipment Obligations and Interest Thereon, Applicable to Freight-train Cars, between Per Diem Cars and All Other Freight-train Cars.
7 — Special Study of Switch Engine Hours Applicable to Freight-train Car Repairs.
10 — Non-revenue Freight Used in Equipment Repairs.
20 — Maintenance of Power Facilities for the Year 1960.
21 — Analysis of Certain Items Reported in Annual Report, Schedule 20 - Size of Freight Cars, for the Year 1960.
30 — Maintenance of Work Equipment.
31 — Maintenance of Miscellaneous Equipment.
I — Taxes Applicable to Freight-train Car Ownership.

9 - Analysis of Relation Between Investment in Shops and Enginehouses and Cost of Repairs Made in Such Facilities.
10 - Survey of Car Accounting Methods.
11 - Special Study of Accounting for Repacking of Journal Boxes.

The studies were accomplished during the calendar year 1960 and, during the course of that year, the Cost Section sent to the respondents a series of five documents of explanatory matter, based upon questions raised regarding the studies. Special arrangements were made to assign field examiners of the Bureau of Accounts to assist, and 34 such examiners were used for this purpose. During the study period they made 97 visits to 69 shops, trainyards, or railroad offices, located in 29 different States. Their reports were sent to the Cost Finding Section and, if any discrepancies appeared in the manner in which the carrier was conducting the special studies, correction thereof was requested. Certain of the forms were required to be filed for the first quarter of the year and, after audit thereof, and testing their results against 1959 reported data, any data which appeared of doubtful accuracy was referred to the particular carrier for further check.

On May 23, 1961, there was appointed an industry advisory committee on per diem costs consisting of representatives from the Baltimore and Ohio, Chicago, Burlington & Quincy, Illinois Central, New York, New Haven and Hartford, Long Island and Boston and Maine Railroads, and the American Short Line Railroad Association. The views of this group were sought, after conference with staff members of the Cost Finding Section, as to a proposed treatment of the deficiency of the reimbursement for the repairs of foreign per diem cars.

The special studies were accomplished, and reported on the prescribed forms, by 104 class I line-haul railroads. To the extent they were required to do so, reports were also received from other lines, as follows:

| | |
|---|---|
| Class II line-haul railroads | 22 |
| Class I switching and terminal companies | 27 |
| Class II switching and terminal companies | 45 |
| Line-haul electric railways | 3 |
| Other electric railways | 4 |
| Total short lines | 155 |
| Class I line-haul railroads | 104 |
| Total reporting roads | 259 |

From the information received as a result of these special studies, and the Annual reports of the carriers, together with certain data obtained from the Section of Valuation of the Bureau of Accounts, the Cost Finding Section made a series of cost computations, more specifically described below, which were subsequently received in evidence after extensive cross-examination of the staff officials responsible for their preparation. The Cost Section also prepared and offered in evidence a cost formula for consideration by

the Commission, designed to develop costs of per diem car ownership, should it be concluded that prescription of a formula was desirable.[14]

The results of the Cost Section's computations are presented in four tables which are designated Summary T-1, Summary MT-1, MT-2, and Summary MT-3.[15] Summary T-1 computes a single-factor, per diem unit cost for foreign per diem cars, in a manner similar to that heretofore employed by the AAR for the same purpose. It makes no allowance for age, value or type of cars, nor does it separate mileage costs from other types of costs. As computed, based upon 1960 figures, it indicates a unit cost of 249.503 cents per car per day.[16] This summary also computed a total and a daily average amount of deficiency in the reimbursement received by railroads for repairs made by them to cars of other lines amounting, using 1960 figures, to 11.417 cents per day.

Summary MT-1 separates unit costs for all per diem cars into those attributable to mileage, and those attributable to all other causes, the latter being designated as "time" costs. This was accomplished by separating ownership costs for all cars according to percentages for mileage and time, developed by the Valuation Section of the Bureau of Accounts. The total mileage costs were reduced to a unit cost per car-mile by dividing by the total line-haul and switching miles, after adjusting the latter by a factor purporting to reflect the greater repair costs engendered by switch movements. The time portion of the total costs was divided by the total active per diem car days for all railroads to develop the unit cost per active car day. The cost per mile thus developed, using 1960 figures, was 2.323 cents, and the cost per car day, 148.738 cents. These figures were not designed to directly ascertain car rental costs, since railroads do not maintain car records of switching mileages, but the figures were computed as a necessary step preliminary to the computations in the following summaries. Both summaries T-1 and MT-1 employ the original cost of freight cars and of freight car repair facilities as a basis for the computation of depreciation and interest on depreciated investment. Since one of the contentions in these cases involves the choice between use of original and reproduction costs, the summaries were each provided with an alternative calculation based upon the latter theory, by which they may be adjusted.

Summary MT-2 develops a unit daily cost for each of the class I line-haul railroads separately, and for class II roads by groups, as well as individually for the defendant railroads in docket No. 31358 and for the various different groups of reporting railroads in the special study program. In this summary the unit daily costs are computed to show the amount each railroad, or group of roads on an average, contributes to the costs of ownership of foreign cars on their lines taking into account the average mileage over which they move such cars. It differs from summary T-1 in that while still designed

[14] This report is designated by the Cost Section as Exhibit No. [illegible] It will be referred to hereinafter as Form B.

[15] The cost analysis supporting these summaries was made a part of exhibits of the Cost Section.

[16] The methods used by the Cost Section in developing [illegible] are set forth in more detail in Appendix [illegible]

to return to car owners their full costs of ownership, it refines the data so as to reflect differences between using lines measured by the way they make of the cars. Thus, for each railroad in this summary, the mileage cost developed in MT-1 is multiplied by the 1960 line-haul and equated switching car-miles of foreign per diem cars on the particular carrier, and the result (widely the per diem days paid for by that carrier in the same year, to reduce the mileage charge to a daily amount. Similarly, the time cost developed in summary MT-1 is divided by the particular carrier's daily average ratio of active foreign per diem cars on its line to total foreign per diem cars on its line, to produce unit time costs per total car day. Addition of the time costs, and the mileage costs reduced to a time basis, produces a daily unit charge applicable to each carrier, or group of carriers, by which the computation was made. The unit cost for all United States railroads computed by the method in MT-2, which is comparable to the unit cost of 245,903 cents per day in summary T-1, is 277 cents, made up of a mileage factor of 138 cents and a time factor of 139 cents. The difference results from giving effect to mileage, since foreign per diem cars run more miles per day than the combined average of all per diem cars. Like summary T-1, there is included in this computation no allowance for age, value or type of cars. The deficiency in user roads recovery of repair costs, developed in summary T-1, may be directly applied to the results reached by application of the MT-2 formula.

Summary MT-3 furnishes an alternative method of calculating the per diem car rental costs chargeable to individual user railroads, taking the mileage factor into account, but without computing a daily rate based upon each carrier's average operations. It is designed to develop, rather, time charges based upon the time each car is actually retained on the user road, and mileage charges based upon the mileage each car is actually moved by the user road. The factor for average switching costs is reduced to a daily amount and included in the time costs, resulting in a daily charge of 139 cents. The mileage cost of 2.33 cents developed in summary MT-1 is applied to line-haul mileage only. Use of this method requires that precise car records be kept showing, not only the days each foreign per diem car is on line, but the total miles it traveled by it.

At the hearings it appeared that other factors, such as the age, value, ~~type~~ of car, might deserve consideration. As a result, the cost section, utilizing the data and computations heretofore developed, made certain additional calculations to the extent possible within the limits of available information, tending to show the results of computing rent using each of the formulas, T-1, MT-1, MT-2, and MT-3, with depreciation and interest on depreciated investment computed on different car values, using both original and reproduction cost bases. Since the special studies did not provide for separation of repair costs, at extra, by ~~type~~ of car, it was examined that all costs other than depreciation and return would remain the same regardless of the value or age of the car, for convenience of comparison, the value brackets used in this computation are the same as employed in the CAM modified rates now in effect. Issues concerning the details and results of the cost section studies are considered and acted on in this report.

Per diem calculations by the AAR staff during the past 15 years have followed the same general pattern but have differed in their details with respect to each rate. Cost statistics for a recent 12 month period have been used in each instance and figures developed for repairs to cars, property taxes, depreciation on cars and on apportioned value of shops, enginehouses, power plants and shop and power plant machinery, interest on depreciated value of the same, apportioned cost of general expense, miscellaneous maintenance of equipment accounts, maintenance of shops, enginehouses, et cetera, interest on investment in stock of freight car material, interest on working capital, and deadhead haul cost of repair material. Each was divided by a car day divisor to develop a unit cost per day, and the results totaled. Generally the AAR staff calculated alternative costs, using different bases, such as ledger value, reproduction value, et cetera, leaving to the general committee and the board of directors of the AAR the decision as to which result should be submitted to the subscribers to the agreement for vote.

The car-day divisor has regularly been computed by taking the average of the ratios, for varying numbers of years, which total cars, less bad order and surplus cars on owners' lines, bore to total cars. This average ratio, applied to the number of days in the year for which the cost statistics were calculated, produced a figure referred to as "active car days per car per year", which was multiplied by the average number of cars in service during that year.[18] Prior to the calculations supporting the $2.40 rate, periods of from 5 to 15 years had been used. For all the rates now in issue, the average of car utilization ratios for the preceding 20-year period were used.

For the calculation of car repair expenses, the costs of the most recent year were used in calculations supporting the $2.75 and earlier rates. In the calculations supporting the $2.85 and multilevel rates, the repair expenses for the most recent 5-year period were averaged, after adjusting them to the wage and price level of the most recent year.

Depreciation on freight cars has always been calculated on a straight-line basis at the average of rates used by the carriers and approved by the Commission, except that calculations supporting the multilevel rates used a flat 5 percent rather than the average of 5.06 percent. Beginning with the calculations supporting the $2.40 rate, reproduction cost of the cars was used as the base for depreciation. Depreciation on apportioned value of shops, enginehouses, et cetera, has been based upon original cost in all calculations except that supporting the $2.40 rate, when the reproduction cost basis was employed.

Interest on investment has been calculated at 6 percent before taxes on both freight cars and repair facilities, using the average of depreciated original and reproduction costs as a base for the $2.40 rate and depreciated reproduction cost as a base for subsequent rates. Prior to the $1.90 rate, the calculations had differed, with depreciated original cost used as the base for interest on repair facilities.

TABLE NO. 20

| Line No. | Item (1) | Use portion (percent) (2) | Time portion (percent) (3) | Weighting (4) |
|---|---|---|---|---|
| 1 | Car wheels—15-year life | 100 | 0 | .14 |
| 2 | Axles (heat-treated)—20-year life | 100 | 0 | .08 |
| 3 | Brake beams, heads, and shoes; couplers, dreft gears, et cetera | 100 | 0 | .13 |
| 4 | Floors, sides, and ends | 70 | 30 | .22 |
| 5 | Door units, tracks and mechanism | 80 | 20 | .11 |
| 6 | Trucks, side frames, journal boxes and parts | 100 | 0 | .16 |
| 7 | Painting, blasting, stenciling | 70 | 30 | .10 |
| 8 | Wrecks and rough usage | 100 | 0 | .04 |
| 9 | Weather | 0 | 100 | .03 |
| 10 | Miscellaneous | 50 | 50 | .02 |
| | Composite | 79 | 21 | 1.00 |

As compiled, the use portion was intended to comprehend the impact of line-haul and switching activities and repairs made necessary by loading and unloading. The latter, included in item No. 4, were reassigned to the time factor by assuming that 50 percent of that item covered such damage, resulting in a decrease of some 8 percentage points in the use column,[123] and an equivalent increase in the time column. The weighting factors in column 4 for the first seven items were based upon data on file in the Engineering Branch. The last three were based on information contained in publications of the American Railway Car Institute, A.R.E.A. proceedings, and qualified by field information, conference of the Engineering Branch staff, and exercise of engineering judgment. All the percentage allocations in the first two columns are based upon engineering knowledge and judgment. As employed by the Cost Section, the portion assigned to "use" was treated as caused by movement of the car over miles of line-haul and switching operations.

Additional analyses of the causes of car repairs, and their relative effect, were conducted by 16 line-haul carriers,[124] having a total ownership of some 720,415 per diem cars in 1960. The analyses were made separately by each participating carrier, with respect to its own equipment and experience. Analysis was made of the average annual cost of replacements or repairs

[123] Fifty percent of the 70-percent use factor for item No. 4 is 35 which, multiplied by the weighting of .22 produces the 8-percent change in allocation. The product was rounded to the 70:30 ratio used by the Cost Section.

[124] Participating in this analysis were the Atchison, Topeka and Santa Fe Railway, Chesapeake and Ohio Railway, Chicago, Burlington and Quincy Railroad, Colorado & Southern Railway, Denver & Rio Grande Western Railroad, Great Northern Railway, Gulf, Mobile & Ohio Railroad, Illinois Central Railroad, Louisville and Nashville Railroad, Missouri Pacific Railroad, Nickel Plate Railroad, Norfolk & Western Railway, Northern Pacific Railroad, Seaboard Air Line Railroad, Southern Pacific Railroad, Texas & Pacific Lines, Union Pacific Railroad, Western Maryland Railroad, and Western Pacific Railroad.

to about 60 component parts of the cars considered, and distribution between those made necessary by line-haul mileage, switching, loading and unloading, and time, was accomplished by use of engineering judgment. The cars considered were 50-ton, 40 feet 6 inches, single-door, standard boxcars, and, for each carrier, that type of gondola and open-top hopper car representing their largest percentage of ownership. The results of each carrier's analysis were weighted according to its ownership of the type of car and combined totals obtained, from which the following distribution of repair causes was developed:

TABLE NO. 21

| | Road-haul miles | Switching operations | Loading and unloading | Time |
|---|---|---|---|---|
| | *Percent* | *Percent* | *Percent* | *Percent* |
| Boxcar | 37.205 | 21.095 | 26.184 | 15.516 |
| Gondola car | 40.486 | 22.432 | 21.305 | 15.777 |
| Hopper car | 36.580 | 21.019 | 16.114 | 26.287 |

If the above conclusions are averaged, the following result is produced:

TABLE NO. 22

| Road haul miles | Switching operations | Loading and unloading | Time |
|---|---|---|---|
| | *Percent* | | |
| 38.090 | 21.515 | 21.201 | 19.193 |

And if line haul and switching operations be combined, as well as loading and unloading and time, for comparison with the 70 and 80 proportions employed by the Cost Section, the comparable figures thus developed are 59.6 and 40.4, or, in round figures, 60 and 40.

While there is a superficial appearance of similarity in these average figures, a comparison of the 16 underlying studies reveals that it is coincidental at best. Set forth below are tables showing, for box and hopper cars, the proportions of repair costs ascribed by officials of the reporting carriers to the four mentioned causal factors. For box cars the combined ratios of line haul and swtiching to loading and unloading and time vary from 74:26 to 45:55. For hopper cars they vary from 85:15 to 37:63.

## TABLE NO. 23

### HOPPER CARS

| Carrier | Road haul | Switching | Load and unload | Time | Combined [1] ratio |
|---|---|---|---|---|---|
| NY, C&St. L- | 35.428 | 21.138 | 19.748 | 23.686 | 57/43 |
| GN | 59.885 | 25.218 | 6.437 | 8.440 | 85/15 |
| D&RG | 51.163 | 27.076 | 10.808 | 10.953 | 78/22 |
| MP | 60.724 | 14.718 | 9.000 | 15.558 | 75/25 |
| WMd | 39.296 | 28.097 | 21.760 | 10.847 | 67/33 |
| LN | 46.560 | 20.693 | 5.051 | 27.426 | 67/33 |
| ATSF | 40.884 | 25.562 | 10.483 | 23.071 | 66/34 |
| UP | 34.889 | 29.246 | 20.207 | 15.657 | 64/36 |
| ACL | 43.086 | 19.516 | 16.415 | 20.984 | 62/38 |
| SP | 43.898 | 18.952 | 20.979 | 18.171 | 62/38 |
| GM&O | 40.185 | 20.786 | 8.668 | 30.361 | 61/39 |
| Ill Cent | 36.810 | 21.986 | 5.773 | 35.431 | 59/41 |
| C&O | 36.419 | 20.900 | 21.809 | 20.872 | 57/43 |
| CB&Q | 28.751 | 24.326 | 19.788 | 27.137 | 53/47 |
| SAL | 35.260 | 16.294 | 18.834 | 29.612 | 51/49 |
| N&W | 19.145 | 18.422 | 23.241 | 39.193 | 37/63 |
| *Spread* | | | | | |
| N&W | 19.145 | ---------- | ---------- | ---------- | ---------- |
| MP | 60.724 | ---------- | ---------- | ---------- | ---------- |
| MP | ---------- | 14.718 | ---------- | ---------- | ---------- |
| UP | ---------- | 29.246 | ---------- | ---------- | ---------- |
| L&N | ---------- | ---------- | 5.051 | ---------- | ---------- |
| N&W | ---------- | ---------- | 23.241 | ---------- | ---------- |
| GN | ---------- | ---------- | ---------- | 8.440 | ---------- |
| N&W | ---------- | ---------- | ---------- | 39.193 | ---------- |
| GN | ---------- | ---------- | ---------- | ---------- | 85/15 |
| N&W | ---------- | ---------- | ---------- | ---------- | 37/63 |

[1] The first figure is the percentage of line-haul and switching rounded off. The second is composed of percentages for loading and unloading and time, also rounded off.

## TABLE NO. 24

### BOX CARS

| Carrier | Road haul | Switching | Load and unload | Time | Combined [1] ratio |
|---|---|---|---|---|---|
| GN | 55.493 | 18.351 | 14.523 | 11.633 | 74/26 |
| MP | 54.065 | 15.253 | 12.584 | 18.098 | 69/31 |
| L&N | 40.800 | 22.890 | 21.981 | 14.329 | 64/36 |
| D&RG | 36.117 | 26.386 | 22.291 | 15.206 | 62/38 |
| CB&Q | 37.812 | 22.866 | 25.837 | 13.485 | 61/39 |
| Ill Cent | 40.516 | 20.836 | 24.143 | 14.505 | 61/39 |
| ACL | 37.467 | 22.572 | 19.985 | 19.978 | 60/40 |
| SP | 38.641 | 21.088 | 24.471 | 15.800 | 60/40 |
| GM&O | 35.650 | 23.183 | 27.660 | 13.507 | 59/41 |
| NY,C&St. L- | 36.207 | 23.196 | 28.389 | 12.208 | 59/41 |

See footnote at end of table.

BOX CARS—Continued

| Carrier | Road haul | Switching | Load and unload | Time | Combined [1] ratio |
|---|---|---|---|---|---|
| WMd | 30.451 | 25.567 | 34.844 | 9.138 | 56/44 |
| C&O | 32.722 | 21.914 | 28.175 | 17.289 | 55/45 |
| SAL | 35.260 | 16.294 | 18.834 | 29.612 | 51/49 |
| ATSF | 30.191 | 19.596 | 34.197 | 16.016 | 50/50 |
| UP | 21.868 | 26.672 | 36.825 | 14.534 | 48/52 |
| N&W | 27.944 | 16.844 | 31.780 | 23.432 | 45/55 |
| *Spread* | | | | | |
| UP | 21.868 | ---------- | ---------- | ---------- | ---------- |
| GN | 55.493 | ---------- | ---------- | ---------- | ---------- |
| MP | ---------- | 15.253 | ---------- | ---------- | ---------- |
| UP | ---------- | 26.672 | ---------- | ---------- | ---------- |
| MP | ---------- | ---------- | 12.584 | ---------- | ---------- |
| UP | ---------- | ---------- | 36.825 | ---------- | ---------- |
| WMd | ---------- | ---------- | ---------- | 9.138 | ---------- |
| SAL | ---------- | ---------- | ---------- | 29.612 | ---------- |
| GN | ---------- | ---------- | ---------- | ---------- | 74/26 |
| N&W | ---------- | ---------- | ---------- | ---------- | 45/55 |

[1]The first figure is the percentage of line-haul and switching rounded off. The second is composed of percentages for loading and unloading and time, also rounded off.

A witness for the New York Central testified that a substantially greater proportion of the repair costs should be attributed to line-haul mileage, with relatively little allocation to time and switching. This witness did not, however, testify as to the exact proportions he considered appropriate. The Pennsylvania Railroad conducted a separate analysis of records concerning its 50 foot box cars, 70-ton gondolas, and 70-ton hopper cars, in which the repairs were ascribed to time, road-haul mileage, switching, and loading and unloading, separated according to three assumed conditions; (1) cars held on tracks without movement, (2) cars in road train service but without loads moving 20,000 miles per year for box cars and 10,000 miles per year for gondolas and hopper, and (3) cars in similar road-haul service but loaded and unloaded 18 times per year. In round figures, the result of this analysis was a distribution of 72 percent of repair costs to road mileage and switching, 11 percent to loading and unloading, and 17 percent to time.

* * * * * * *

B.—*Time-mileage allocations-depreciation of freight cars.*—In its calculations of time and mileage charges, the Cost Section assigned 45 percent of depreciation to mileage and 55 percent to time. These proportions were developed by the Engineering Branch of the Section of Valuation, as were those for repairs, in connection with the computations underlying Rail Form A, and published in Statement 7-63, *Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs.* Like the similar distribution of

repairs, it is based on judgment of the staff officials, rather than on specific tests. In developing the various percentages, the depreciation was first separated into a "use" portion and a "time" portion. The former purports to isolate that portion of depreciation attributable to the wear and tear due to running operations, switching operations, and loading and unloading operations. Subsequently, the loading and unloading portion was transferred to "time" and the remainder assigned as the mileage element of depreciation. All other was assigned to "time." The latter also purports to include depreciation resulting from the action of the elements and obsolescence. The distribution of the depreciation charges between use and time was accomplished by separating the tare weight of the car into 43 principle parts and assigning a portion of the weight of each part to one or the other factor. It was assumed that the relative weight of the parts approximated the relative costs for replacement of the parts. In developing the proportions, the weighted figures as calculated for box cars, hopper cars, and gondola cars were averaged. The result was 46:54 which was rounded to 45:55 or use in the cost formula. An example of this process is shown in table 25 below.

## TABLE NO. 25

| Item— | Standard steel gondola car | | | | |
|---|---|---|---|---|---|
| | Total weight | Use | Time | Use portion weight (column 2 x column 3) | Time portion weight (column 2 x column 4) |
| (1) | (2) | (3) | (4) | (5) | (6) |
| | *Pounds* | *Percent* | *Percent* | *Pounds* | *Pounds* |
| **Running gear group:** | | | | | |
| Wheels | 4,822 | 100 | 0 | 4,822 | 0 |
| Axles | 3,920 | 100 | 0 | 3,920 | 0 |
| Springs and snubbers | 774 | 60 | 40 | 464 | 310 |
| Journal box parts | 618 | 80 | 20 | 494 | 124 |
| Brake beams and heads | 470 | 50 | 50 | 235 | 235 |
| Brake shoes | 178 | 100 | 0 | 178 | 0 |
| Brake levers, connections, hangers, et cetera | 255 | 50 | 50 | 128 | 127 |
| Couplers | 865 | 60 | 40 | 519 | 346 |
| Coupler yokes | 414 | 60 | 40 | 243 | 166 |
| Coupler operating devices | 47 | 80 | 20 | 38 | 9 |
| Air brake equipment | 663 | 50 | 50 | 332 | 331 |
| Pipe, fittings and clamps | 218 | 20 | 80 | 44 | 174 |
| Levers, rods, supports, et cetera | 472 | 50 | 50 | 236 | 236 |
| Hand brake | 144 | 50 | 50 | 72 | 72 |
| **Underframe group:** | | | | | |
| Truck side frames and journal boxes | 2,995 | 20 | 80 | 599 | 2,396 |
| Truck bolsters, center plates and side bearings | 2,196 | 20 | 80 | 439 | 1,757 |
| Center sills | 4,560 | 20 | 80 | 912 | 3,648 |
| Bolsters-complete Under- | 2,878 | 20 | 80 | 576 | 2,302 |
| Cross bearers frame | 2,718 | 20 | 80 | 544 | 2,174 |
| Cross ties | 1,100 | 20 | 80 | 220 | 880 |
| Draft gear, followers and carriers | 749 | 50 | 50 | 375 | 374 |
| Draft gear keys and retainers | 108 | 50 | 50 | 54 | 54 |
| Center braces, plates, et cetera | 693 | 20 | 80 | 139 | 554 |

## TABLE NO. 25—Continued

| Item— | Standard steel gondola car | | | | |
|---|---|---|---|---|---|
| | Total weight | Use | Time | Use portion weight (column 2 x column 3) | Time portion weight (column 2 x column 4) |
| (1) | (2) | (3) | (4) | (5) | (6) |
| | *Pounds* | *Percent* | *Percent* | *Pounds* | *Pounds* |
| Body group: | | | | | |
| Side construction | 12,591 | 50 | 50 | 6,295 | 6,295 |
| End construction | 2,389 | 50 | 50 | 1,195 | 1,194 |
| Floor construction | 7,505 | 80 | 20 | 6,004 | 1,501 |
| Inside stake pockets | 369 | 60 | 40 | 221 | 148 |
| Handholds, ladders, sill steps, et cetera | 190 | 20 | 80 | 38 | 152 |
| Rivets and welding rod | 838 | 50 | 50 | 419 | 419 |
| Bolts, nuts, washers, cotters, et cetera | 32 | 50 | 50 | 16 | 16 |
| Paint, oil and waste | 334 | 50 | 50 | 167 | 167 |
| Miscellaneous | 22 | 50 | 50 | 11 | 11 |
| Total tare weight of gondola car | 56,163 | ------- | --------- | 29,967 | 26,196 |
| Composite for gondola | --------- | [1]53 | [1]47 | [2]29,766 | 26,397 |

[1]"Use" portion computed by dividing the figure of 29,967 pounds from column 5 by the total weight of 56,163 pounds shown in column 2, percent equals 53.36. This figure was rounded off to 53 percent and used. The remaining portion (47 percent) was chargeable to time.

[2]Figure of 29,766 used, being 53 percent of total tare weight of 56,163 pounds.

*Rail Form H–Summary T-1 docket No. 31358 cost calculation*

| Line No. | Item | Aggregate ownership costs | Per diem unit cost (cents) |
|---|---|---|---|
| | *1953* | | |
| 1 | Freight-train car repairs | $679,141,264 | 123.865 |
| 2 | Depreciation–cars | 163,087,704 | 29.744 |
| 3 | Depreciation–facilities | 6,980,345 | 1.273 |
| 4 | Property taxes–cars | 64,212,598 | 11.712 |
| 5 | Property taxes–facilities | 3,433,615 | .626 |
| 6 | Payroll taxes | 19,476,702 | 3.553 |
| 7 | Return on investment–cars | 201,930,867 | 36.829 |
| 8 | Return on investment–facilities | 10,756,924 | 1.962 |
| 9 | Hire of freight cars | 9,431,201 | 1.720 |
| 10 | Return on working capital | 3,978,983 | .726 |
| | Total | 1,162,430,203 | 212.010 |
| | *1954* | | |
| 1 | Freight-train car repairs | 554,890,318 | 126.055 |
| 2 | Depreciation–cars | 169,767,994 | 38.567 |
| 3 | Depreciation–facilities | 7,043,238 | 1.600 |
| 4 | Property taxes–cars | 63,311,400 | 14.382 |
| 5 | Property taxes–facilities | 3,438,457 | .781 |
| 6 | Payroll taxes | 18,146,192 | 4.122 |
| 7 | Return on investment–cars | 199,041,096 | 45.216 |
| 8 | Return on investment–facilities | 10,875,323 | 2.470 |
| 9 | Hire of freight cars | 11,242,442 | 2.554 |
| 10 | Return on working capital | 3,296,897 | .749 |
| | Total | 1,041.053,357 | 236.499 |
| | *1955* | | |
| 1 | Freight-train car repairs | 603,286,136 | 104.959 |
| 2 | Depreciation–cars | 171,434,763 | 29.826 |
| 3 | Depreciation–facilities | 7,363,580 | 1.281 |
| 4 | Property taxes–cars | 67,140,565 | 11.681 |
| 5 | Property taxes–facilities | 3,668,064 | .638 |
| 6 | Payroll taxes | 19,501,025 | 3.393 |
| 7 | Return on investment–cars | 203,184,954 | 35.350 |
| 8 | Return on investment–facilities | 11,062,659 | 1.924 |
| 9 | Hire of freight cars | 14,893,645 | 2.591 |
| 10 | Return on working capital | 3,179,292 | .553 |
| | Total | 1,104,714,683 | 192.198 |
| | *1956* | | |
| 1 | Freight-train car repairs | 644,379,078 | 106.545 |
| 2 | Depreciation–cars | 176,897,170 | 29.249 |
| 3 | Depreciation–facilities | 7,505,969 | 1.241 |
| 4 | Property taxes–cars | 72,150,484 | 11.930 |
| 5 | Property taxes–facilities | 3,771,113 | .624 |
| 6 | Payroll taxes | 23,131,938 | 3.825 |
| 7 | Return on investment–cars | 222,568,063 | 36.801 |
| 8 | Return on investment–facilities | 11,259,737 | 1.862 |
| 9 | Hire of freight cars | 18,254,405 | 3.017 |
| 10 | Return on working capital | 3,496,749 | .579 |
| | Total | 1,183,414,706 | 195.673 |

*Rail Form H–Summary T-1 docket No. 31358 cost calculation*–Con.

| Line No. | Item | Aggregate ownership costs | Per diem unit cost (cents) |
|---|---|---|---|
| | *1957* | | |
| 1 | Freight-train car repairs | $651,821,299 | 110.972 |
| 2 | Depreciation–cars | 192,614,649 | 32.792 |
| 3 | Depreciation–facilities | 7,642,434 | 1.301 |
| 4 | Property taxes–cars | 78,420,978 | 13.351 |
| 5 | Property taxes–facilities | 3,816,368 | .649 |
| 6 | Payroll taxes | 23,785,664 | 4.049 |
| 7 | Return on investment–cars | 251,928,349 | 42.890 |
| 8 | Return on investment–facilities | 11,352,234 | 1.933 |
| 9 | Hire of freight cars | 21,226,295 | 3.614 |
| 10 | Return on working capital | 3,003,640 | .511 |
| | Total | 1,245,606,910 | 212.062 |
| | *1958* | | |
| 1 | Freight-train car repairs | 557,905,703 | 123.417 |
| 2 | Depreciation–cars | 207,207,427 | 45.837 |
| 3 | Depreciation–facilities | 7,573,445 | 1.675 |
| 4 | Property taxes–cars | 79,402,419 | 17.565 |
| 5 | Property taxes–facilities | 3,754,155 | .830 |
| 6 | Payroll taxes | 21,964,085 | 4.859 |
| 7 | Return on investment–cars | 256,308,192 | 56.699 |
| 8 | Return on investment–facilities | 11,222,647 | 2.483 |
| 9 | Hire of freight cars | 25,839,462 | 5.716 |
| 10 | Return on working capital | 3,004,609 | .664 |
| | Total | 1,174,182,144 | 259.747 |
| | *1959* | | |
| 1 | Freight-train car repairs | 603,784,873 | 118.498 |
| 2 | Depreciation–cars | 210,695,645 | 41.351 |
| 3 | Depreciation–facilities | 7,846,928 | 1.541 |
| 4 | Property taxes–cars | 81,335,604 | 15.963 |
| 5 | Property taxes–facilities | 3,847,571 | .755 |
| 6 | Payroll taxes | 26,470,719 | 5.196 |
| 7 | Return on investment–cars | 262,253,764 | 51.469 |
| 8 | Return on investment–facilities | 11,364,753 | 2.230 |
| 9 | Hire of freight cars | 32,890,216 | 6.455 |
| 10 | Return on working capital | 2,997,354 | .588 |
| | Total | 1,243,487,429 | 244.046 |
| | *1960* | | |
| 1 | Freight-train car repairs | 583,715,117 | 116.713 |
| 2 | Depreciation–cars | 214,654,958 | 42.700 |
| 3 | Depreciation–facilities | 8,023,021 | 1.596 |
| 4 | Property taxes–cars | 82,153,074 | 16.342 |
| 5 | Property taxes–facilities | 3,824,341 | .760 |
| 6 | Payroll taxes | 28,140,156 | 5.597 |
| 7 | Return on investment–cars | 272,469,259 | 54.200 |
| 8 | Return on investment–facilities | 11,489,897 | 2.286 |
| 9 | Hire of freight cars | 48,929,073 | 9.733 |
| 10 | Return on working capital | 2,896,316 | .576 |
| | Total | 1,256,295,212 | 249.903 |

*Rail Form H–Summary T-1 docket No. 31358 cost calculation*–Con.

| Line No. | Item | Aggregate ownership costs | Per diem unit cost (cents) |
|---|---|---|---|
| | *1961* | | |
| 1 | Freight-train car repairs | $542,296,733 | 114.025 |
| 2 | Depreciation–cars | 219,854,362 | 46.227 |
| 3 | Depreciation–facilities | 7,972,133 | 1.676 |
| 4 | Property taxes–cars | 78,986,170 | 16.608 |
| 5 | Property taxes–facilities | 3,686,054 | .775 |
| 6 | Payroll taxes | 26,091,704 | 5.486 |
| 7 | Return on investment–cars | 274,381,398 | 57.692 |
| 8 | Return on investment–facilities | 11,569,671 | 2.433 |
| 9 | Hire of freight cars | 58,820,065 | 12.367 |
| 10 | Return on working capital | 2,778,174 | .584 |
| | Total | 1,226,436,464 | 257.873 |
| | *1962* | | |
| 1 | Freight-train car repairs | 560,508,850 | 122.210 |
| 2 | Depreciation–cars | 227,907,354 | 49.692 |
| 3 | Depreciation–facilities | 7,963,807 | 1.736 |
| 4 | Property taxes–cars | 76,570,423 | 16.694 |
| 5 | Property taxes–facilities | 3,518,132 | .767 |
| 6 | Payroll taxes | 27,554,545 | 6.008 |
| 7 | Return on investment–cars | 281,404,864 | 61.355 |
| 8 | Return on investment–facilities | 11,502,266 | 2.508 |
| 9 | Hire of freight cars | 68,949,490 | 15.033 |
| 10 | Return on working capital | 2,847,599 | .621 |
| | Total | 1,268,727,330 | 276.624 |
| | *1963* | | |
| 1 | Freight-train car repairs | 550,322,495 | 108.968 |
| 2 | Depreciation–cars | 235,414,671 | 46.614 |
| 3 | Depreciation–facilities | 8,071,570 | 1.598 |
| 4 | Property taxes–cars | 71,238,098 | 14.106 |
| 5 | Property taxes–facilities | 3,385,171 | .670 |
| 6 | Payroll taxes | 27,145,511 | 5.375 |
| 7 | Return on investment–cars | 273,339,558 | 54.123 |
| 8 | Return on investment–facilities | 11,645,943 | 2.307 |
| 9 | Hire of freight cars | 76,831,485 | 15.213 |
| 10 | Return on working capital | 2,665,587 | .528 |
| | Total | 1,260,060,089 | 249.502 |
| | *1964* | | |
| 1 | Freight-train car repairs | 564,752,370 | 111.906 |
| 2 | Depreciation–cars | 249,246,959 | 49.389 |
| 3 | Depreciation–facilities | 8,088,396 | 1.603 |
| 4 | Property taxes–cars | 81,165,680 | 16.083 |
| 5 | Property taxes–facilities | 3,257,518 | .646 |
| 6 | Payroll taxes | 28,162,325 | 5.580 |
| 7 | Return on investment–cars | 320,427,320 | 63.492 |
| 8 | Return on investment–facilities | 10,557,090 | 2.092 |
| 9 | Hire of freight cars | 90,957,044 | 18.023 |
| 10 | Return on working capital | 2,750,841 | .545 |
| | Total | 1,359,365,543 | 269.359 |

*Rail Form H–Summary T-1 docket No. 31358 cost calculation*–Con.

| Line No. | Item | Aggregate ownership costs | Per diem unit cost (cents) |
|---|---|---|---|
| | *1965* | | |
| 1 | Freight-train car repairs | $562,290,338 | 110.712 |
| 2 | Depreciation–cars | 266,697,638 | 52.511 |
| 3 | Depreciation–facilities | 8,143,383 | 1.604 |
| 4 | Property taxes–cars | 87,570,856 | 17.242 |
| 5 | Property taxes–facilities | 3,324,476 | .655 |
| 6 | Payroll taxes | 29,179,129 | 5.745 |
| 7 | Return on investment–cars | 355,651,226 | 70.025 |
| 8 | Return on investment–facilities | 10,754,036 | 2.117 |
| 9 | Hire of freight cars | 119,334,451 | 23.496 |
| 10 | Return on working capital | 2,946,264 | .580 |
| | Total | 1,445,891,797 | 284.687 |

**Appendix F**

SERVICE DATE
JUNE 7, 1968

ORDER
INTERSTATE COMMERCE COMMISSION
No. 33145*

RAILROAD FREIGHT CAR PER DIEM CHARGES

IN THE MATTER OF POSTPONING THE EFFECTIVE DATE OF ORDER

PRESENT: PAUL J. TIERNEY, Chairman, to whom the above matter which is the subject of this order, has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceedings, the judicial review action in the United States District Court for the District of Nebraska, entitled Civil Action No. 02981, *Union Pacific Railroad Company, et al. v. United States, et al.*, in which a preliminary injunction is sought to enjoin the effective date of the order entered herein on January 17, 1968, and the need for a postponement of said effective date in order to permit briefs to be filed and consideration thereof by the court in ruling on the pending motion for preliminary injunction; and good cause appearing therefor:

*It is ordered*, That the present effective date of the Commission's order entered herein January 17, 1968, be, and

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* Embracing No. 31358, Chicago, Burlington & Quincy R. Co., et al. v. New York, Susquehanna & Western Railroad Co., et al., and No. 34405, Southern Railway Company, et al. v. The Pennsylvania Railroad Company, et al.

it is hereby, postponed from October 1, 1968, until November 15, 1968.

Dated at Washington, D. C., this 29th day of May, 1968.

By the Commission, Chairman Tierney.

H. NEIL GARSON
Secretary

(SEAL)

Appendix G

SERVICE DATE
NOVEMBER 18, 1968

ORDER
INTERSTATE COMMERCE COMMISSION
No. 31358*

CHICAGO, BURLINGTON & QUINCY RR. CO., ET AL.
v.
NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

IN THE MATTER OF POSTPONING THE EFFECTIVE DATE OF ORDER

PRESENT: PAUL J. TIERNEY, Chairman, to whom the above matter, which is the subject of this order, has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceedings, the judicial review action in the United States District Court for the District of Nebraska, entitled Civil Action No. 02981, *Union Pacific Railroad Company, et al.* v. *United States, et al.*, in which a preliminary injunction was entered on November 7, 1968, enjoining the effective date of the order entered in Docket No. 33145 on January 17, 1968, as modified by order dated May 29, 1968, and the need for a further postponement in order to comply with the preliminary injunction entered in the court proceeding; and good cause appearing therefor:

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* Embracing No. 33145, Railroad Freight Car Per Diem Charges and No. 34405, Southern Railway Company, et al. v. The Pennsylvania Railroad Company, et al.

*It is ordered,* That the present effective date of the Commission's orders entered in Docket No. 33145 on January 17, and May 29, 1968, be, and it is hereby, postponed from November 15, 1968, until further order of the Commission.

Dated at Washington, D. C., this 13th day of November, 1968.

By the Commission, Chairman Tierney.

H. NEIL GARSON
Secretary

(SEAL)

**Appendix H**

SERVICE DATE
JUNE 16, 1969

ORDER
INTERSTATE COMMERCE COMMISSION
No. 31358*

CHICAGO, BURLINGTON & QUINCY R. CO. ET AL.

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

IN THE MATTER OF ESTABLISHING THE EFFECTIVE DATE OF ORDER

PRESENT: VIRGINIA MAE BROWN, Chairman, to whom the above matter, which is the subject of this order, has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceedings, including the report of the Commission in 332 I.C.C. 176, the judicial reviews of the Commission's decision herein by the United States District Courts for the District of Massachusetts, *Boston and Maine Railroad, et al. v. United States and Interstate Commerce Commission*, Civil Action No. 56-1004-G, *Boston and Maine Corporation* v. *United States and Interstate Commerce Commission*, Civil Action No. 68-79-G and the District of Nebraska in Civil Action No. 02981, *Union Pacific Railroad Company, et al.* v. *United States*, et al., the opinions

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*Embracing No. 33145, Railroad Freight Car Per Diem Charges and No. 34405, Southern Railway Company, et al. v. The Pennsylvania Railroad Company, et al.

and judgments of said Courts on March 20, 1969 and May 28, 1969, sustaining the report and order of the Commission on further hearing decided January 17, 1968:

*It is ordered,* That on and after August 1, 1969, respondents in docket No. 33145 be, and they are hereby, required to maintain accurate records of both the days on-line of foreign per diem freight-train cars and the line-haul mileage over which they move each such car, and to pay to the owners of said cars the charges per day and per mile set forth in rate in rate table C in said report; that this order shall continue in force and effect until the further order of the Commission; and that the charges herein provided shall be paid for each day foreign cars are held but nothing in this report and order shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

Dated at Washington, D. C., this 12th day of June, 1969.

By the Commission, Chairman Brown.

H. NEIL GARSON
Secretary

(SEAL)

Appendix I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

**UNION PACIFIC RAILROAD COMPANY, et al.,**
**Plaintiffs**
**vs.**
**UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,**
**Defendants**

**CIVIL 02981**
**ORDER**

Plaintiffs, Union Pacific Railroad Company, et al., have filed a motion for an injunction in which they seek to enjoin defendants from enforcing, during the pendency of the appeal from this Court's decision of May 27, 1969, to the Supreme Court of the United States, a certain order of the Interstate Commerce Commission. In order to minimize the possible injury to all parties it is hereby

ORDERED that defendants, their agents, servants, employees and attorneys, and all persons in active concert with them, be and they hereby are enjoined during the pendency of the appeal from enforcing the order of the Interstate Commerce Commission dated January 17, 1968, in proceedings identified as Docket Nos. 31358, 33145 and 34405, except so much of that order [as modified by orders of the Interstate Commerce Commission dated May 29, 1968, and June 12, 1969] which requires the respondents in Docket No. 33145 on and after August 1, 1969, "to maintain accurate records for both the days on-line for foreign per diem freight-train cars and the line-haul mileage over which they move each such car . . .": in the event this Court's judgment is affirmed by the United States Supreme Court, the Interstate Commerce Commission shall then

determine the effective date of resettlement, and the terms thereof, provided said effective date is not prior to August 1, 1969, unless otherwise directed to the contrary by the United States Supreme Court.

Dated this 7th day of July, 1969.

/s/ DONALD P. LAY
Circuit Judge

/s/ RICHARD E. ROBINSON
Chief District Judge

/s/ ROBERT VAN PELT
District Judge

Office Supreme Court U.S.
FILED
NOV 3 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1969

No. 480

ARIZONA CORPORATION COMMISSION, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

---

On Appeal from The United States District Court for The District of Nebraska

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# BRIEF OF APPELLANT STATE REGULATORY COMMISSIONS OPPOSING MOTIONS TO AFFIRM

---

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1969

No. 480

ARIZONA CORPORATION COMMISSION, et al.,

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vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

---

On Appeal from The United States District Court for The District of Nebraska

---

# BRIEF OF APPELLANT STATE REGULATORY COMMISSIONS OPPOSING MOTIONS TO AFFIRM

The motion to affirm filed by the government characterizes the appeals as seeking "to have the Court resolve a dispute within the railroad industry on highly complex and technical questions." (p. 9).

This is not merely a dispute between railroads. Were it merely that, there would be no need for an appeal by the state regulatory commissions of twenty-one states (Arizona, Arkansas, California, Colorado, Florida, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana,

Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Texas, Washington and Wyoming).

While "highly complex and technical questions" may have been involved before the Commission, the question presented to the Court in the jurisdictional statement filed by the state regulatory commissions (hereinafter referred to as "states") can hardly be so characterized. It is: whether the Interstate Commerce Commission acted contrary to the provisions of 49 U.S.C. § 1 (14)(a) when it prescribed new rates for the use of freight cars without considering the effect of those new rates upon the freight car supply. It is a matter of statutory construction, and does not involve complex questions concerning railroad economics or the effects of various methods of computing rates on railroads and their users.

The government's motion attempts to interject issues which are not relevant to the question of statutory construction. At page 12, footnote 7, for instance, the motion quotes from an Interstate Commerce Commission order. In doing so it infers that per diem rates make no difference to railroads in their determination to build railroad cars. The obvious answer is that in fact the Commission failed to consider incentive rates at all. But neither the inference nor the answer to it will lend assistance to the Court, as neither relate to whether or not the Interstate Commerce Commission should or should not

have prescribed new rates without considering the effect of those rates on freight car supply.

The "complexity" of the question presented is limited to a single area, ferreting out the various indicia of congressional intent. The government's motion contains only one of many such indicia (p. 12). The jurisdictional statement of the states contains several, and a brief from the states, should probable jurisdiction be noted, will set forth the various manifestations of congressional intent which have compelled them to believe that the Commission erred in prescribing per diem rates without adherence to the plain statutory mandate of 49 U.S.C. § 1 (14)(a).

The reference to legislative history mentioned (p. 13) by the government is fragmentary, and this, too, requires full discussion by way of a brief in order that its significance may be analyzed and not be considered out of context. Demonstrably, the Commission had no authority to override the statute.

If permitted to do so, the states will show through their brief that the amendment to the statute which provides for incentive per diem rates was enacted at the behest of state governments and shippers, and not at the request of railroads, although some railroads favored the amendment while others opposed it. The motive of the states and shippers was

to reduce the frequency and intensity of chronic car shortages through car rental rates. It was expected that car rental rates would result in better utilization of the present car fleet (as noted in the States' jurisdictional statement, p. 7, the average freight car is idle over 300 days per year). The car rental rates on those types of cars in particularly short supply could be set at levels sufficiently high to encourage additions to the fleet. The government's attitude is accordingly quite surprising. While not denying that chronic car shortages do exist, the government sees fit to prescribe car rental rates, which on balance are very substantially lower than existing rates, and to defend that action on the basis that at some time in the unforeseeable future they may get around to obeying the mandate of Congress. The result is, of course, anti-incentive per diem rates under which a car can be left idle on a siding until cargo can be found for it. The car will incur no mileage charge, of course, and the very low time charge greatly reduces the incentive to return an empty car to its owner.

Inadequate car rental charges are responsible in part for chronic car shortages. Shippers and government representatives convinced a sufficient number of Congressmen that car rental rates should be set at a level which would improve the situation, and Congress provided therefor. The government has seriously distorted the purpose of the con-

gressional enactment, and has proceeded to prescribe rates which will aggravate the car supply situation. The states claim this to be error since it ignores the clear intent of Congress, and submit that they should have their day in court to show that error. The motions to affirm filed herein should be denied.

Respectfully submitted,

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FILED
DEC 5 1969
JOHN F. DAVIS, CLERK

NO. 480

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

ARIZONA CORPORATION COMMISSION, et al.,
*Appellants,*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
*Appellees.*

**On Appeal from The United States District Court for the District of Nebraska**

## PETITION BY APPELLANT STATE REGULATORY COMMISSIONS FOR REHEARING

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December, 1969

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

NO. 480

ARIZONA CORPORATION COMMISSION, et al.,
*Appellants,*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
*Appellees.*

**On Appeal from The United States District Court for the District of Nebraska**

## PETITION BY APPELLANT STATE REGULATORY COMMISSIONS FOR REHEARING

Come now appellants, state regulatory commissions, and earnestly Petition for Rehearing of this Court's Order of November 10, 1969, affirming without argument this appeal from the order of the Interstate Commerce Commission prescribing rental rates for railroad freight cars.

In summarily disposing of these appeals as a package, we believe that the Court has allowed the public interest represented by the State appellants to be suffocated by the Government's argument that this case involves only a controversy between the railroads which are parties to other appeals as to whether rental rates are too high or too low (Motion to Affirm, p. 10). The States are not concerned with the interests of the railroads as bailors or bailees of freight cars. The States are concerned solely with the al

ready serious impact on their shippers and their economies of the shortage of freight cars and the uncontroverted fact that the order of the Commission will make that shortage worse.

The concern of the States over freight car shortages is what led to the enactment in 1966 of the amendment to Section 1(14)(a), which provides:

> "In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply. . . ." (49 U.S.C. § 1(14)(a)).

The Commission's order fixes rates for the use of freight cars, but the Commission refused to consider, on the theory that it was irrelevant, the impact of its order on the nation's freight car supply. The States filed their complaint in the court below for the sole purpose of enforcing the statute in order to protect the public interest which the statute was designed to serve.

There is no denying the uncontroverted fact that the car shortage is critical, and that it is getting worse every day. According to a recent statement by the Chairman of the Interstate Commerce Commission, in 1966, the year Section 1(14)(a) was amended, the reported daily average shortages of cars ranged from 3,312 to 13,066, which was serious enough, in the Congress' view, to warrant corrective legislation. The Chairman also stated that in 1969, "reported daily shortages range from 4,626 on January 11 to a high of 18,480 on March 29." (Statement of Virginia Mae Brown, Chairman, Interstate Commerce Commission, on Railroad Freight Car Shortages, Before the Committee on Commerce, United States Senate, May 13, 1969; p. 13.) Since May 13th, when those figures were presented to the Senate, the car supply problem has become even more seri-

ous. On November 1, 1969, the reported daily shortage had jumped to *23,121*. (CS 44-C Reports filed with the Interstate Commerce Commission.) These shortages are crippling the ability of our shippers to obtain badly needed rail transportation for their goods.

Nor is there any doubt that the Commission's order would make the shortage worse by reducing the incentive for the railroad industry to use their cars efficiently or to replace their cars which become unusable or obsolete.*

Therefore, if this Court's order is not modified, and if the Commission's order is permitted to become effective, that order will worsen the car shortage afflicting our states. Furthermore, there will have been no definite construction of the statute, the court below having written three separate and conflicting opinions as to the meaning of Section 1(14)(a).

In requesting argument, these State appellants do not seek any rehearing of the railroads' appeals. The appeal in No. 343 did not raise any question as to the construction of Section 1(14)(a); and the Massachusetts court properly dismissed the compaint of Boston & Maine, et al., raising question as to the sufficiency of the record before the Commission. Nor have the State appellants ever expressed any interest in the questions raised by the railroad appel

* Counsel for the Commission and the United States admit that the "basic" per diem rates prescribed are "perhaps conflicting" with the "purpose of improving car supply." (Motion to Affirm, p. 12.) However, they argue, without any basis in any Commission finding, that any disincentive effect the reduced daily charges will have on car utilization is "speculative" because of the mileage charge which, combined with the daily charge, they say "is likely to create a higher daily payment than at present." (Motion to Affirm, p. 15.) In fact, the mileage charge increases the disincentive of the reduced time charge by making it more expensive for user lines to return empty cars to their owners, and the Commission has never found otherwise.

lants in No. 497 apart from the proper construction of Section 1(14)(a). The States' sole concern is with the proper construction and enforcement of the statutory provisions relating to the adequacy of car supply, not with any contest between car-owning and car-using railroads over the level of freight car rental rates. Such issues, raised by the railroads' appeals, should not be permitted to deny the States their day in Court to argue on behalf of the public interest which Section 1(14)(a) was enacted to protect.

The statutory issue as to which we seek argument is not complex and requires no review of the record. It arises from the Commission's construction of the statute rendering the effect of its order on car supply irrevelant. This issue can be quickly briefed and readily argued on the summary calendar.

WHEREFORE, appellants' Petition for Rehearing should be granted, probable jurisdiction noted and this appeal set for argument on the summary calendar.

Respectfully submitted,

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State Capitol
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68509

December, 1969

## CERTIFICATE OF COUNSEL

I hereby certify, pursuant to Rule 58(1) of the Rules of this Court, that the foregoing petition for rehearing is presented in good faith and not for delay.

RICHARD W. SABIN
*Counsel for Appellants in No. 480*

No. 1517

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

UNION PACIFIC RAILROAD COMPANY, et al.,

*Appellants*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,

*Appellees*.

On Appeal from the United States
District Court for the District of Nebraska

## JURISDICTIONAL STATEMENT


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*Attorneys for Appellants*


August, 1960.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No.

UNION PACIFIC RAILROAD COMPANY, et al.,
*Appellants,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
*Appellees.*

**On Appeal from the United States District Court for the District of Nebraska**

## JURISDICTIONAL STATEMENT

Appellants' appeal from the judgment of the United States District Court for the District of Nebraska dismissing their complaint to set aside an order of the Interstate Commerce Commission prescribing new rates for the use of freight cars.

Union Pacific Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington and Quincy Railroad Company; Chicago & Eastern Illinois Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Colorado and Southern Railway Company; The Denver and Rio Grande Western Railroad Company; Fort Worth and Denver Railway Company; Great Northern Railway Company; Louisville and Nashville Railroad Company; Missouri Pacific Railroad Company; Norfolk and Western Railway Company; Northern Pacific Railway Company; Southern Pacific Company; St. Louis San Francisco Railway Company; Seaboard Coast Line Railroad Company; Soo Line Railroad Company; The Texas and Pacific Railway Company; Western Maryland Railway Company; The Western Pacific Railroad Company

## OPINIONS BELOW

The judgment and opinions of the district court are not yet reported. The judgment signed by two of the three judges is set forth in Appendix A (App., p. 1a).* The Memorandum Opinion of Judge Robinson is set forth in Appendix B (App., p. 2a). Judge Lay's separate concurring opinion is set forth in Appendix C (App., p. 32a), and Judge Van Pelt's dissenting opinion is set forth in Appendix D (App., p. 34a).

The report and order of the Interstate Commerce Commission, published at 332 I.C.C. 176, is set forth in Appendix E (App., p. 39a). Subsequent orders of the Commission postponing the effective date of its order and then setting an effective date of August 1, 1969, appear as Appendices F (App., p. 143a), G (App., 145a) and H (App., p. 147a), respectively. The district court's order of July 7, 1969, enjoining enforcement of the Commission's order pending this appeal appears as Appendix I (App., p. 149a).

## JURISDICTION

The judgment of the three judge district court is dated May 27, 1969 (App. A, p. 1a). These appellants filed their notice of appeal in the district court on June 24, 1969. The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253, 2325, 2101(b). *Baltimore & Ohio R. Co. v. Aberdeen & R. R. Co.*, 393 U.S. 87 (1968); *Penn Central Merger and N&W Inclusion Cases*, 389 U.S. 486 (1968).

* Appendices A through I are separately bound as a Joint Appendix to the Jurisdictional Statements of both groups of Appellants – Arizona Corporation Commission et al. and Union Pacific Railroad Company, et al.

## QUESTIONS PRESENTED

The Interstate Commerce Commission prescribed new rates for the use of freight cars pursuant to Section 1(14)(a) of the Interstate Commerce Act which provides that, in fixing "compensation for the use of any type of freight car," the Commission "shall give consideration to . . . factors affecting the adequacy of the national freight car supply," and that the Commission "shall, on the basis of such consideration, determine" the proper freight car rental. The question presented is whether the Commission violated Section 1(14)(a) when it prescribed new rates for the use of freight cars but refused to consider, as irrelevant, evidence showing that the new rates would have a seriously adverse effect on the national freight car supply.

A separate question presented is whether the provisions of the Administrative Procedure Act requiring reasoned findings based on substantial evidence were violated by the Commission in its determination of the rate of return to car owning railroads on their investment in freight cars.

## STATUTES INVOLVED

The statute of primary concern in this appeal is Section 1(14)(a) of the Interstate Commerce Act, [49 U.S.C. § 1(14)(a)]. Other statutory sections involved are the National Transportation Policy [49 U.S.C. preceding Section 1] and Sections 8(b) and 10(e) of the Administrative Procedure Act [codified as 5 U.S.C. § ... (b) and ...(e)]. These statutory provisions are set forth in the Statutory Appendix hereto [infra, p. 21, et seq.].

## STATEMENT

### Background

In the early years of rail transportation in the United States, individual railroads owned the freight cars they used to serve their shippers, and when freight moved over

1966. Section 1(14)(a), which authorizes the Commission to fix compensation for the use of railroad equipment, was thus amended to provide:

> "In fixing such compensation to be paid for the use of any type of freight car, the Commission *shall* give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national car supply. . . ." (Emphasis supplied.)

Section 1(14)(a) as amended further provides that the Commission

> "*shall, on the basis of such consideration,* determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." (Emphasis supplied.)

The 1966 amendment to Section 1(14)(a) thus superimposed on existing Commission authority (as defined in the *Palmer* case) the power to increase compensation for the use of freight cars to a level in excess of ownership costs by adding an "incentive element." The amendment also made it explicit and mandatory that car supply factors be given consideration by the Commission in any case in which it fixes compensation for the use of freight cars.

**The Proceedings Before the Commission.**

At the time the 1966 amendment of Section 1(14)(a) became effective, a proceeding was pending before the Commission for determination of the compensation to be paid for the use of freight cars. That proceeding grew out of a

dispute that had arisen when several small railroads refused to pay the per diem rates agreed upon by the industry acting through the Association of American Railroads (AAR). In 1955 the Commission issued a declaratory ruling (Docket No. 31358) that the AAR rates were not in excess of reasonable compensation. *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I.C.C. 291 (1955). That ruling was set aside by a three-judge court in the District of Massachusetts on the ground that the Commission had not adequately considered a proposal of one of the small railroads that there be a separate per diem rate for each railroad to reflect the different mileages run by the individual railroads. *Boston & Maine R. Co.* v. *United States*, 162 F.Supp. 289, 297 (D.Mass. 1958), *appeal dismissed*, 358 U.S. 68 (1958).

On remand of the case to the Commission, the prior adversary proceeding was reopened and, in addition, a new proceeding under Section 1(14)(a) was instituted by the Commission on its own motion for the purpose of prescribing the compensation to be paid throughout the entire industry for the rental of freight cars (Docket No. 33145). All railroads were made party to this new proceeding, including appellants herein.

At the hearings, the Commission's staff proposed that compensation for the use of freight cars no longer be based solely on a daily charge, but that compensation be based partly upon a reduced daily charge and partly upon a mileage charge. In response to this proposed time-mileage system, a number of witnesses testified as to the adverse effect that such a system would have upon freight car supply.[3] For example, Witness Baumgartner, Superintend-

[3] *E.g.*, Exhibit R-120, pp. 5-7 (Witness Baumgartner); Exhibit R-98, p. 13 (Witness Budd); Exhibit R-146, p. 7 (Witness Monroe); Exhibit R-119, p. 14 (Witness Brown); Exhibit R-184, pp. 10, 17 (Witness Hamilton); Exhibit R-54 (AAR Circular).

ent of Transportation of the Santa Fe, testified as follows (Exhibit R-120, pp. 5-7):

> "[T]he adoption of a system of rates based upon separate time and mileage factors would be a backward step from the standpoint of efficiency in utilization of the available car supply. Under the time-mileage system the user would pay a lower rate when the car was sitting still than when it was moving, and therefore the car could be held for prospective loading or could be handled at 'carrier's convenience' through terminals and junctions at a lower basis of rental than would be applicable under a rental system based upon time alone, and when the time-mileage system is incorporated into a schedule of rates graduated on value, the situation is particularly aggravated in the lower value brackets, where most of the present fleet of general purpose cars fall."
>
> • • •
>
> "The other side of the coin is that the separation of rental into time and mileage factors tends to penalize the carrier that is trying to handle cars efficiently by making as many miles per day as possible. Whereas the carrier which lets a car in the $1,000-$5,000 bracket sit idle might pay only $1.46 as the daily rental, the carrier that ran the car 300 miles in a day would pay $1.46 plus an additional $6.84 as the mileage factor. In my opinion such a premium on keeping a car idle and such a penalty on producing high mileage is a step in the wrong direction in fixing freight car rental."

The Commission's failure and refusal to consider such uncontroverted evidence, on the theory that it was irrelevant, gives rise to the primary issue in this case.

**The Order of the Commission.**

On January 17, 1968, over a year and a half after enactment of the amendment to Section 1(14)(a), the Commission prescribed a new structure of car rental rates effective

October 1, 1968.[4] Instead of a single rate per day for a given freight car, the Commission's order would require that the rate be calculated by adding (1) a rate per day and (2) a rate per mile times the number of miles run by that car (332 I.C.C. at 231; App. E, p. 94a). The result of the Commission's order would be to reduce substantially the amount a car-using railroad would be required to pay to hold a car idle. Under the rate structure presently in effect, for example, the per diem rate for a $12,500 freight car is $4.50 (332 I.C.C. at 185; App. E, p. 48a). The Commission's order would reduce the daily charge to $3.49 (332 I.C.C. at 242; App. E, p. 105a). At the same time, the separate mileage rate would deter a railroad from maximizing the mileage run by a freight car.

In reaching this result, the Commission expressly refused to consider the evidence of record showing the adverse impact the prescribed time-mileage rates would have on car supply, holding that such considerations, "however beneficial," were not applicable to "the determination of the rates in this case" (332 I.C.C. at 223; App. E, p. 86a). Under the Commission's reading of Section 1(14)(a), this evidence was irrelevant because the Commission's powers were limited in this proceeding "to determining compensation (*basic* per diem) based strictly upon cost considerations" (332 I.C.C. at 257; App. E, p. 120a). The Commission further stated (*Ibid.*):

> "While the incentive provisions are not involved in the instant proceedings and cannot be considered on this record, in other proceedings currently pending at various stages of administrative process, the Commission is moving toward determination of whether or not incentive rates should be established and the attendant question of modification of our present car service rules."

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[4] The effective date was later extended to August 1, 1969, and, except for record-keeping provisions, has been stayed pending this appeal (App. F through I).

The "other proceedings" referred to by the Commission as dealing with the question of "whether or not incentive rates should be established" was the incentive per diem case, *Ex Parte 252*. The sole issue in *Ex Parte 252* was whether the existing per diem rates should be increased by $2.50 per day or some other amount. At no stage of that proceeding was there brought in issue or considered by the Commission the question of the effect on the national car supply of substituting a time-mileage system of compensation for the existing per diem basis. In the Commission's first report in that investigation, the proceeding was discontinued because adequate information necessary to decide upon an increase in existing per diem rates was not available. *Incentive Per Diem Charges,* 332 I.C.C. 11, 12, 16 (1967). The Commission thereafter instituted another proceeding *Ex Parte 252 (Sub No. 1)*, directed exclusively to the question of whether an "incentive element" should be added to freight car rental rates, and undertook to assemble additional data. No hearings have as yet been held in that proceeding.

Thus, neither in the *Per Diem* proceedings which resulted in the order now in question, nor in the *Ex Parte 252* proceedings, has the Commission given any consideration at all to the evidence showing that abandonment of a per diem basis and the substitution of a time-mileage system of car rentals would have a seriously adverse impact on the national car supply.

**The Decision of the Three-Judge Court.**

On May 27, 1969, the three-judge court below handed down three separate opinions. The opinion of District Judge Robinson (App. B, p. 2a), while acknowledging that the Commission had refused to consider car supply factors in this case, held that the evidence showing the adverse impact of the prescribed time-mileage rates on car supply was irrelevant as a matter of law (App. B, p. 14a):

> "The plaintiff railroads vigorously contend that under the statute as amended the Commission cannot lawfully refuse to give consideration to car supply factors when it enters an order prescribing the compensatory per diem for the use of freight cars. We do not read the statutory language as providing such a requirement. . . ."

Judge Robinson accepted the Commission's theory that determination of rates for the use of freight cars could be separated into two kinds of proceedings, one to consider solely the elements of ownership expenses (so-called basic per diem) and the other to consider whether an incentive element should be added (incentive per diem). Under this theory, consideration of factors affecting the national car supply are relevant in the incentive per diem proceedings, but: "Car supply factors have no relevance to the computation of [basic] per diem" (App. B, p. 25a). On this theory, Judge Robinson concluded "that the Commission properly rejected a consideration of car supply factors in the computation of basic per diem" (App. B, p. 26a).

Circuit Judge Lay, concurring in the judgment (App. C, pp. 32a-33a), was unable to rationalize the Commission's refusal to consider the impact of the time-mileage system on car supply (App. C, p. 32a):

> "The literal interpretation of Section 1(14)(a) of the Interstate Commerce Act (49 U.S.C. § 1(14)(a)) seems to require the Commission to consider the incentive rates along with the per diem rates and simultaneously in the same proceeding to make a deliberate choice between the two, based upon car supply factors. I have difficulty in rationalizing that the Commission has in fact made a deliberate choice as directed."

Judge Lay nevertheless held that the Commission had "substantially complied" with the 1966 amendment of Section 1(14)(a), even though there would be a time lag between

the effective date of the time-mileage order and any action taken by the Commission in the pending incentive proceeding *(Ex Parte 252 (Sub No. 1))*, because he believed that the time lag would not be a long one (App. C, p. 33a):

> "I conclude that the Commission must act, as soon as practicable, to set incentive rates on the basis of inadequacy of car supply. It has the affirmative duty to do so."

The dissenting opinion of District Judge Van Pelt (App. D, pp. 34a-36a) concluded that the Commission's action violated the provisions of Section 1(14)(a) (App. D, p. 35a):

> "Under the Commission order now affirmed by my colleagues, a rate is promulgated which admittedly has been established without consideration of the factors which the Congress said shall be considered. . . . Congress, in view of the car shortage and the Commission's inaction, was within its rights in using the mandatory 'shall' and in attempting to prevent the Commission from doing what it now proposes to do, namely, start another proceeding, with endless hearings and examinations, by requiring that its action be taken in the same proceeding in which it 'fixes compensation.' I feel this court should insist that the mandate of the Congress be carried out now."

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The Commission's refusal to consider evidence showing that adoption of a time-mileage basis of freight car rentals would have a serious impact upon the nation's supply of freight cars constitutes a plain violation of the statute.

The 1966 amendment to Section 1(14)(a) directs that, in any proceeding in which the Commission fixes the "compensation to be paid for the use" of freight cars, "the Commission *shall* give consideration . . . to factors affecting the

adequacy of the national car supply and *shall, on the basis of such consideration,*" determine freight car rental rates. (Emphasis supplied.)

The order of the Commission at issue in this appeal fixes the compensation to be paid for the use of freight cars. But the Commission did not give consideration to car supply factors as required by statute. The Commission prescribed a time-mileage system of freight car rental rates, not on the basis of consideration of the effect such a system of rates would have on the nation's freight car supply, but in complete disregard of the effect of its order on car supply. The evidence of record showing the adverse impact which the time-mileage system would have on car supply was not considered at all but was cast aside as irrelevant.

The issue before this Court does not involve any question as to the judgment or discretion of a regulatory agency. In this case, it has been conceded by the Commission in its report and by the court below that the Commission has not exercised any judgment with respect to the impact the prescribed time-mileage rates would have on car supply. Consideration of all such evidence having been refused on the theory that it was irrelevant, this appeal presents not a question of administrative discretion but the question of whether the Commission properly construed the 1966 amendment to Section 1(14)(a) as permitting it to fix compensation for the use of freight cars while refusing to consider, as irrelevant, evidence showing that the prescribed time-mileage system would adversely affect the national freight car supply. As this Court held in *Volkswagenwerk* v. *F.M.C.*, 390 U.S. 261, 272 (1968):

> "The issue in this case, however, relates not to the sufficiency of evidence but to the construction of a statute. The construction put on a statute by the agency

> charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153-154. But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U.S. 278, 291. 'The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia. . . .' *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318."

The Commission's theory, approved explicitly by one judge and implicitly by another judge concurring in dismissal of the complaint, is that the Commission can separate its determination of compensation for the use of freight cars into two stages, "basic per diem" and "incentive per diem." But the fundamental statutory question does not concern the manner or procedure by which the Commission hears and determines the compensation to be paid for the use of freight cars. The question raised by this appeal is whether the statute permits the Commission to prescribe and make immediately effective a new method of compensation for the use of freight cars in the absence of any consideration by the Commission, in any proceeding, of the impact that such a new time-mileage system would have on the national car supply. Under the construction of the statute adopted by the Commission and sustained by the divided Court below, the entire subject of the impact on car supply of the time-mileage system falls between two chairs: it is held irrelevant in this "basic" per diem case, and it was not at issue and was not considered in the "incentive" per diem case.

Under the pre-existing law, the Commission was authorized to consider, and did consider, the effect on car supply of rates for the use of freight cars computed wholly on a daily basis rather than on a mileage basis (*Palmer, supra* pp. 5-6). Such a construction of the statute prior to the 1966 amendment was fully in accord with the National Transportation Policy in which Congress directed that all provisions of the Interstate Commerce Act be administered so as "to promote . . . efficient service and foster sound economic conditions in transportation" (49 U.S.C. preceding § 1). The 1966 amendment *added* to the powers of the Commission and explicitly directed that "the Commission shall give consideration to . . . factors affecting the adequacy of the national car supply" in any case in which the Commission fixes the compensation to be paid for the use of freight cars.

The whole purpose of the 1966 amendment was "to secure alleviation of the recurring national shortages of railroad freight cars" by authorizing increases in the daily charge. (House Report, *supra,* pp. 6-7.)[5] Yet, the Commission's

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[5] The entire discussion in Judge Robinson's opinion demonstrating that Congress enacted the House bill and not the Senate bill (App. B, pp. 15a-19a) is beside the point. Appellants rely on the bill reported by the House Committee and enacted by the Congress, and do not rely on the different language of the Senate bill. In fact, both the House and Senate were motivated by the same basic purpose to *increase* the Commission powers to prescribe *higher* per diem rates by eliminating the restrictions found in the *Palmer* case. House Committee Chairman Staggers stated that there was no difference in "philosophy" between the House and Senate bills (112 Cong. Rec. 10,452 (1966)). And, when the House version of the bill was presented to the Senate for final enactment, Senate Committee Chairman Magnuson advised the Senate that "while the House amendments change the language of the bill in a number of respects, the House and Senate versions of S. 1098 are substantially the same" (112 Cong. Rec. 10,755 (1966)).

order would reduce the daily charge for the use of freight cars in the face of this Congressional purpose. And the Commission has done this while treating as irrelevant the effect of its action on car supply despite express statutory language requiring that "the Commission shall give consideration . . . to factors affecting the adequacy of the national car supply." Thus, the decisions of the Commission and the court below are not only contrary to the express terms and manifest purpose of the 1966 amendment to Section 1(14)(a) to improve car supply, but in giving the amendment an interpretation which is 180 degrees at odds with its terms and purpose, they would make the car supply problem worse.

The statutory question presented by this appeal is not only substantial as a legal issue but is vitally important to the railroad industry and the national economy. The serious freight car shortages cited by the Congressional reports in 1966 have become even more severe. An order of the Commission which, according to the uncontroverted evidence, would further aggravate the national freight car shortage should not be permitted to become effective without the substantial statutory issue presented by this appeal receiving plenary review by this Court.

2. A separate issue is presented by the Commission's determination of the rate of return factor used in calculating the annual cost of owning freight cars.

The Commission's approach was to split the property base of the national car fleet into two segments, one representing the capital invested directly by the car owners and the other representing the amount secured through debt financing. Then the Commission applied separate rates of return to each segment of the property base, one representing the cost of equity capital and the other the cost of debt.

The net effect of these calculations was to allow car owners a return on their investment in freight cars of less than 4 percent after taxes (6 percent before taxes) (332 I.C.C. at 213, 268; App. E, pp. 76a, 131a). Such a return is plainly inadequate where the interest rate on debt alone exceeded 6 percent at the time the record was made, and now exceeds 8 percent.

Appellants showed in the court below that the Commission's conclusions with respect to rate of return were not supported by any evidence (the Commission having used a method of calculation which neither the parties nor the Commission's staff had considered and as to which no evidence was adduced at the hearings). The Commission itself stated with respect to the rate of return on equity capital that "no evidence is of record on this point" (332 I.C.C. at 212; App. E, p. 75a). Judge Robinson's opinion disposes of this point by stating: "Such a matter is within the Commission's discretion" (App. B, p. 30a).

Administrative discretion may be exercised on the basis of evidence, but discretion cannot be substituted for evidence. *Baltimore & Ohio R. Co.* v. *Aberdeen & R. R. Co.*, 393 U.S. 87, 91-92 (1968). Sections 8(b) and 10(e) of the Administrative Procedure Act require that administrative determinations be supported by reasoned findings based upon substantial evidence. 5 U.S.C. §§ 557(c), 706. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168 (1962). Enforcement of these legal standards is especially important in this case where the result of the Commission's determination of rate of return is to produce unduly low freight car rental rates at a time of serious freight car shortages.

## CONCLUSION

For the foregoing reasons, this appeal presents substantial questions in the interpretation and administration of the Interstate Commerce Act. Probable jurisdiction should be noted and the case set down for full hearing on the merits.

**Respectfully submitted,**

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August, 1969

## Statutory Appendix

Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), provides as follows:

> "The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest."

The National Transportation Policy, 49 U.S.C. preceding Section 1, provides as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and faster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 8(b) of the Administrative Procedure Act, formerly 5 U.S.C. § 1007(b) and now revised and codified as 5 U.S.C. § 557(c) (80 Stat. 387), provides:

> "Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof."

Section 10(e) of the Administrative Procedure Act, formerly 5 U.S.C. § 1009(e), and now revised and codified as 5 U.S.C. § 706 (80 Stat. 393), provides:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

SUPREME COURT, U. S.

OCT. 29 1969

JOHN F. DAVIS, CLERK

NO. 497

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

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UNION PACIFIC RAILROAD COMPANY, et al.,
*Appellants,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
*Appellees.*

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**On Appeal from the United States District Court for the District of Nebraska**

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## BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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**On Appeal from the United States District Court for the District of Nebraska**

## BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

Appellees ask that this Court not hear argument on the premise that the case presents merely a dispute between railroads over complex questions within the discretion of the Interstate Commerce Commission (U. S. Motion; p. 9; C&NW Motion, pp. 19-20). This misstates the primary issue in this appeal.

This is not a case in which the Commission has, in its discretion, weighed the effect of its order on the interest of the public and the railroads in efficient freight car utilization. The question presented here is one of statutory construction arising from the unusual circumstance that the Commission has admittedly refused to consider, on the ground that it was irrelevant, the impact that its order prescribing a time-mileage system of freight car rentals would

have on the nation's car supply. The Commission refused to exercise any discretion to consider this critical subject because it erroneously read the statute as precluding consideration of car supply factors in a "basic per diem" case.

Penetrating the fog of administrative "expertise" with which appellees would surround the case, the following propositions emerge:

> (1) This country is confronted with an increasingly serious car supply problem;
>
> (2) Evidence in this record shows that a time-mileage system of freight car rentals would substantially worsen the existing car supply situation; and,
>
> (3) The Commission has not given any consideration, in this case or in any other case, to the adverse impact that its prescription of a time-mileage system would have on car supply.

Nothing in the opinions of the Commission and the court below even purports to challenge the evidence showing the adverse consequences of a time-mileage system on the car supply. Instead, the Commission held that the car supply considerations supporting the present time basis of determining freight car rentals, "however beneficial," could not be considered in determining this case (332 I.C.C. at 223; App. E, p. 86a). And the opinion of Judge Robinson below sustained the Commission's theory that "car supply factors have no relevance" (App. B, p. 25a). Such holdings simply cannot be reconciled with the requirement of the 1966 amendment of Section 1(14)(a) of the Interstate Commerce Act that, in any proceeding in which the Commission fixes the "compensation to be paid for the use of [freight cars], . . . the Commission *shall* give consideration to . . . factors affecting the adequacy of the national car supply." (Emphasis supplied.)

Appellees attempt to avoid the plain language of the statute on the theory that Congress intended existing law with respect to "basic per diem" to remain unchanged (U.S.

Motion, pp. 6, 11-12). But even assuming, arguendo, that the 1966 amendment did not change existing law, the Commission's refusal to consider the adverse impact that a time-mileage structure of car rentals would have on car supply cannot be justified. Prior to the 1966 amendment of Section 1(14)(a), it had been uniformly recognized by the Commission and the courts that car supply consequences were properly considered in adopting a time basis rather than a mileage or time-mileage basis of car rental rates. *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 374-375 (1930), affirmed in relevant part sub nom. *Chicago, R. I. & P. Ry Co.* v. *United States*, 284 U.S. 80, 90, 102-103 (1931); *Palmer* v. *United States*, 75 F. Supp. 63, 68 (D.D.C. 1947); see also *New England Divisions*, 62 I.C.C. 513, 538 (1921). Appellees cite no case, and we know of none, in which the Commission or the courts had previously held that the effect on car supply of an order prescribing freight car rentals was irrelevant.[1]

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[1] The decision in *Boston & Maine R. Co.* v. *United States*, 162 F. Supp. 289 (D. Mass. 1958), appeal dismissed, 358 U.S. 68 (1958), was entirely consistent with the prior holdings. The Commission's error in that case was its refusal to consider and make findings with respect to a proposal that there be a different per diem charge for each railroad, reflecting the average mileages of cars over each railroad (162 F. Supp. at 297) (referred to as a "time-mileage plan," although differing from the separate computation of miles for each car prescribed by the Commission in the present case). The court did not even suggest that the Commission could not continue to consider the impact on car supply of an order prescribing car rentals, holding (162 F. Supp. at 298):

> "We do not say, for it is not our function to say, that the time-mileage plan proposed is fair and practical and ought to be adopted. What we do say is that the plan deserves more than the cursory consideration given to it by the Commission, for without more detailed findings by it we cannot exercise our judicial function."

In the present case the Commission has committed the same error by going to the opposite extreme in refusing to consider and weigh car supply factors in determining the structure of car rentals.

Appellees attempt to overcome the deficiency in the Commission's action in the present case by repeated references to the so-called *Incentive* case (U.S. Motion, pp. 6-7, 9, 13-14; C&NW Motion, pp. 12, 22-23, 26). But the effect of a time-mileage system on car supply was not considered in that case in which no one ever suggested the prescription of a time-mileage system and the Commission made no reference to the subject.[2] Railroad appellants are driven to the assertion that: "At neither stage [the basic per diem case or the incentive case] is the impact on car supply of the time-mileage system necessarily relevant" (C&NW Motion, p. 25). This is an untenable position in light of the statutory requirement that in fixing compensation for the use of freight cars, "the Commission shall give consideration to . . . factors affecting the adequacy of the national freight car supply."

Appellees also attempt to brush aside the effect of the Commission's order on the national car supply by characterizing the whole case as merely an intra-railroad dispute in which some railroads want high rental rates, other railroads want low rental rates, and the Commission cannot be expected to please everyone (U.S. Motion, pp. 3-4, 9-10; C&NW Motion, p. 4). The question before the Commission with respect to the time-mileage system was not whether the payments were too high or too low, but whether structuring the payments on a separate time and mileage basis inherently operated as a deterrent to efficient car utilization

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[2] The briefs of the railroads filed in the *Incentive* case (cited in C&NW Motion, p. 27, n. 23) were not discussing the time-mileage system and properly assumed that the impact of such a system on car supply would be considered by the Commission in the present case which was then pending and in which a time-mileage proposal was at issue.

(see J.S. pp. 9-10).[3] And the question before this Court is not whether the rates are too high or too low, but whether the Commission violated the express command of Section 1(14)(a) when it refused to consider, as irrelevant, the uncontroverted evidence showing that the prescribed time-mileage basis would seriously worsen an already critical freight car shortage.

Appellees are incorrect in asserting that appellant railroads are all "creditor roads" and are therefore appealing because of their self-interest in higher car rental rates (U.S. Motion, p. 11; C&NW Motion, p. 17). To the contrary, seven of the twenty-two appellant railroads are debtor roads.[4] Whether debtors or creditors, all appellants are basically aggrieved by the impact of the time-mileage system, not merely because of their rental receipts or payments, but because of their concern over freight car shortages that prevent them from obtaining the freight cars necessary to originate freight shipments. Inability to meet the demands of the freight shippers also means the loss of freight revenue, whether the carrier shows a debit or credit in its balance of rental payments and receipts.

This case is important because of the effect the Commis-

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[3] The table set forth by the Government showing car rentals on cars "if moved the average number of miles shown by the 1960 study" (U.S. Motion, p. 15, n. 9) is completely nonresponsive. The whole point of the evidence relied upon by appellants is that the time-mileage system would operate to reduce the utilization of the cars. The Government's table assumes, contrary to the uncontroverted evidence of record, that freight cars will continue to move the same number of miles per day despite the disincentive effect that a separate mileage charge would have on the movement of cars.

[4] This is shown in Schedule 376 of the Annual Reports for 1968 filed by appellants with the Interstate Commerce Commission.

sion's order would have in aggravating freight car shortages. The Government acknowledges that this case involves "a matter of obvious importance to the nation's railroads" (U.S. Motion, p. 10). It is equally obvious that the case involves a matter of great importance to the nation's freight shippers and thus to the national economy. Congress acted in 1966 to amend Section 1(14)(a) because, as the House Committee stressed in reporting the bill which was enacted: "Something must be done to meet the needs of the shippers and the public and of the country" (H. Rep. No. 1183, 89th Cong., 1st Sess. 2). When Congress said that "something must be done" and amended Section 1(14)(a), Congress certainly did not contemplate a Commission order which would aggravate the car supply problem while rejecting consideration of car supply as irrelevant.

The Government's sole reason for asking this Court to refuse to hear argument in this obviously important case is that "there is little that the courts can do to assist the Commission in its efforts to solve this vexatious problem" (U.S. Motion, p. 10). This is not so. If, as appellants contend, the Commission has misconstrued Section 1(14)(a) in rejecting as irrelevant any consideration of the adverse impact of its order on the nation's car supply, it is the duty of the courts under Section 10(e) of the Administrative Procedure Act to set aside agency action found to be contrary to the governing statute (5 U.S.C. § 706). The courts, not the agencies, "are the final authorities on issues of statutory construction." *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968). See also *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 385 (1965). And it is especially important that this Court decide the issue of statutory construction where, as here, no two judges have as yet agreed upon the proper

construction of Section 1(14)(a) in this case of first impression.[5]

The Commission is the agency having jurisdiction to prescribe car rental rates, but its decision must be in accordance with the governing statute. And that statute must be construed to give effect to, not frustrate, the intent of Congress as expressed in plain statutory terms. If this Court decides that the statute means what it says in requiring that the Commission *shall* consider the impact of any order prescribing car rental rates upon the freight car supply and thus may not refuse to consider the subject as irrelevant, the result on remand will be that the Commission will obey the statute thus construed and will not again issue an order which has the effect of worsening already serious car shortages without ever having taken any account of the effect of its order on car supply.

Thus, contrary to the Government's argument, this Court can make a significant contribution to the national interest

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[5] The Government errs in asserting that Judge Lay agreed with Judge Robinson in holding that the Commission had in effect considered car supply factors in the *Incentive* case (U.S. Motion, p. 9). Judge Lay did not hold that the Commission had already considered car supply factors, but proceeded on the premise that the Commission has a mandatory duty to prescribe an incentive element in the future and would do so very promptly unless the Commission finds that no car shortage exists or that an incentive element would not contribute to sound car service practices (App. C, pp. 32a-33a). Commission counsel rely upon Judge Lay's vote, but in asserting complete Commission discretion, they reject his conclusion that the Commission has a mandatory duty to prescribe an incentive element. Commission counsel thus seek affirmance on a theory consistent with the opinion of but one of the three judges.

The need for definitive construction of the statute is, itself, a compelling reason for plenary review by this Court.

in an adequate freight car supply by construing Section 1(14)(a) in accordance with the manifest intent of Congress. Surely this Court will not shirk its responsibilities by declining even to hear argument on a substantial question of statutory construction in a case of such great importance to the railroads, the shipping public and the national economy.[6]

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[6] Just as the construction of the governing statute is the proper function of this Court, the further question presented (J.S. p. 3) involves the entirely judicial function of determining whether the Commission's action with respect to the rate of return on freight cars was supported by evidence. Contrary to the Government's assertion that this determination was "peculiarly for the Commission's broad discretion" (U.S. Motion, p. 16), the question presented has nothing to do with discretion, but with the existence of evidence to support the Commission's action (J.S., pp. 18-19).

## CONCLUSION

For the foregoing reasons and the reasons set forth in the Jurisdictional Statement, the questions presented by this appeal are important and substantial. Probable jurisdiction should be noted.

**Respectfully submitted,**

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NO. 497

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

UNION PACIFIC RAILROAD COMPANY, et al.,
*Appellants,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
*Appellees.*

On Appeal from the United States
District Court for the District of Nebraska

## PETITION FOR REHEARING

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OCTOBER TERM, 1969

## NO. 497

UNION PACIFIC RAILROAD COMPANY, et al.,
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vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
*Appellees.*

**On Appeal from the United States District Court for the District of Nebraska**

## PETITION FOR REHEARING

Appellants herein support the proposal of the state regulatory commissions, appellants in No. 480, that, of all the issues raised in all of the appeals from the Commission's order, only the issue of statutory construction raised in No. 480 be argued in this Court.

All of the issues raised in the appeal of the Boston & Maine, et al. (No. 343), rejected by a unanimous court in Massachusetts, as well as the secondary issues raised by this appeal, as to which there was no disagreement among the members of the court below, required review of the Commission's determination of questions of cost accounting and other cost issues after the making of an extensive record. The Commission's determination of these various questions had resulted in increasing or reducing the rates

paid by railroads for the use of cars owned by other railroads.

The sole issue raised in No. 480 is very different. It presents a question of statutory construction apparent on the face of the Commission's opinion and not calling for any review of the record. The question goes to the basic structure of the Commission's prescribed rates, not to whether the rates are too high or too low. And the question of construction of the 1966 amendment of Section 1(14)(a) involves the public interest in an adequate car supply, not the purely private interests of the railroads. On this statutory question, the court below split three ways.

In lumping together all these appeals, the Government's Motion to Affirm has allowed the other issues presented by the railroad appellants to obscure the public interest issue raised in No. 480, with the result that this Court affirmed in all three appeals, thereby depriving the public interest of its day in Court. To avoid again obscuring the statutory construction issue, this Court should grant rehearing solely with respect to the issue raised in No. 480.

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December 1969

## CERTIFICATE OF COUNSEL

I, Howard J. Trienens, counsel for appellants Un
Pacific Railroad Company, et al., do hereby certify t
the foregoing Petition for Rehearing is presented in g
faith and not for delay.

HOWARD J. TRIENENS
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# SUPREME COURT OF THE UNITED STATES

October Term, 1969

BOSTON & MAINE R. CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ARIZONA CORPORATION COMMISSION ET AL. *v.* UNITED STATES ET AL.; and

UNION PACIFIC R. CO. ET AL. *v.* UNITED STATES ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Nos. 343, 480, and 497. Decided November 10, 1969.

PER CURIAM.

The motions to affirm are granted and the judgments are affirmed.